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TRUST FUNCTIONS

DR. NORMAN A. WIGGINS

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PREFACE

THERE has been a rapid development of trust business during the past few years. Fiduciary services are now being offered by banking institutions in increasing numbers. Notwithstanding this unprecedented growth, there are few published texts dealing with the fundamental principles underlying the work of either trust companies or trust departments in banks. During the past three years there have been many requests made of the American Institute of Banking to prepare a text dealing with trust functions. These requests have come from Institute graduates and others who have felt the need of training in trust work. This text, therefore, has been prepared principally for those who desire to study the various phases of trust service rather than as a technical reference book. The text was written by Robert Mayer, Assistant Trust Officer of the Provident Trust Company of Philadelphia. It is based on an outline which was prepared by William H. A. Johnson, Assistant Secretary of the Continental and Commercial Trust and Savings Bank, Chicago. In addition, valuable cooperation in the preparation of the book has been rendered by Earl I. Vaughan, Assistant Trust Officer of the Fidelity National Bank and Trust Company, Kansas City, Missouri; Leroy A. Mershon, Secretary of the Trust Company Division of the American Bankers Association, and Richard W. Hill, National Secretary of the American Institute of Banking and member of the New York Bar. In general, the rights, duties, and liabilities of trust companies, as described in this text, are applicable to other banking institutions which have organized trust departments, and whenever the words "trust companies" are used, they are intended to include also all banks engaged in trust work.

Institute Platform

RESOLUTION adopted at the New Orleans Convention of the American Institute of Banking, October 9, 1919:

"Ours is an educational association organized for the benefit of the banking fraternity of the country and within our membership may be found on an equal basis both employees and employers; and in full appreciation of the opportunities which our country and its established institutions afford, and especially in appreciation of the fact that the profession of banking affords to its diligent and loyal members especial opportunities for promotion to official and managerial positions, and that as a result of the establishment and maintenance of the merit system in most banks a large number of Institute members have through individual application achieved marked professional success, we at all times and under all circumstances stand for the merit system and for the paying of salaries according to the value of the service rendered.

"We believe in the equitable cooperation of employees and employers and are opposed to all attempts to limit individual initiative and curtail production and, insofar as our profession is concerned, are unalterably opposed to any plan purporting to promote the material welfare of our members, individually or collectively, on any other basis than that of efficiency, loyalty and unadulterated Americanism."

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Trust Functions

Introduction

THE word "trust" in its broadest sense and especially as it is often too loosely used today is practically impossible to define. In its technical sense the definition of a "trust," as found in Bouvier's Law Dictionary (Rawles Third Revision), is quite clear and concise. It is declared to be: "A right of property, real or personal, held by one party for the benefit of another." Quoting further from Bouvier we learn that: "A trust is an obligation imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he may himself be one, and any one of whom may enforce the obligation." "This definition is proposed after an enumeration of many given by judges and text writers, and a critical discussion of them, by W. G. Hart (15 L. Q. R. 294)." Again, a trust is defined as: "An obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully and according to such confidence." (Tiedm. Eq. Jur. Sec. 253; 4 Kent's Com. 295; 1 Saunders, Uses and Trusts, 6; 3 Blackstone's Com. 431.)

Trusts, technically, imply two estates or interests, one equitable and the other legal. The holder of the legal title is called the trustee; the

holder of the equitable title or beneficial interest is called the *cestui que trust* or beneficiary. As set forth in Bispham's Equity, " . . . the right of the beneficiary *is in* the trust; the obligation of the trustee *results from* the trust; and the right held is the *subject-matter* of the trust. Neither of them is the trust *itself*. All together they constitute the trust."

BROAD USE OF THE TERM TRUST.—The word "trust" as used in this book will be given a slightly broader meaning than its restricted or technical application. It will also be used to include all so-called "agency" accounts; all cases, in fact, in which one acts for another with reference to securities, money, or other property of any kind entrusted to his care. It will be used also to include attorneys-in-fact (who are no more nor less than agents appointed by writing called a "letter of attorney" or "power of attorney"), transfer agents, registrars, escrow agents; in fact, any one acting for another. It will be well to keep in mind in studying this subject that the essential difference between trusts and agencies is that in the case of trusts the title to the property being administered is in the trustee, whereas in the case of agencies the title to the property remains in the persons who have entrusted it to the care of their agents.

In the following pages, therefore, wherever the word "trustee" is used it will include all parties, whether individuals or corporations, who act in any fiduciary or representative capacity, except in those

cases in which particular phases of trust activities discussed, such as wills, intestate estates, guardianships, and the like, make a more specific designation necessary. Likewise, wherever the designation "probate court" is used, it will include orphans' courts, surrogates' courts, and other similar bodies having supervision of the settlement and distribution of estates, or dealing therewith, and having jurisdiction of fiduciaries and of the audit and settlement of their accounts.

JURISDICTION OF COURTS OF EQUITY. —It should be remembered that courts of equity have inherent jurisdiction over the establishment and management of trusts. Probate courts are created by statute and have only such powers and may exercise only such jurisdiction as may be expressly conferred upon them by statute. They ordinarily have jurisdiction over the probate of wills and over the grant of administration, and they have supervision over the management and settlement of a decedent's estate, including collection of assets, allowance and classification of demands or claims, and distribution of the estate either when the decedent died intestate, according to the state law of descent or distribution, or in the case of a testate decedent, according to the provisions of the will. They have, ordinarily, jurisdiction over the estates of minors, persons *non compos mentis* (not of sound mind, memory, or understanding), and others under the special protection of the law. They do not usually have the

powers of a court of equity, although in some states such powers have been conferred upon the surrogate by statute. Since the right of the beneficiary of a trust is enforceable solely in a court of equity, all trustees, as distinguished from administrators, executors, guardians, committees, and conservators, may be called upon to render an accounting or otherwise to submit to the control of a court of equity. Even when a trust is created by will, *i. e.* a testamentary trust, as soon as the administration of the estate has been completed and the subject matter of the trust transferred from the executor to the trustee, who may be the same individual as the executor, the trustee is accountable to and his acts are under the jurisdiction of a court of equity and not of the court of probate.

Historical

While the doctrine of "uses and trusts" found its way into English law several centuries ago and had its prototype in laws of other countries, trusts as we now know them, and particularly the administration thereof by corporate trustees or fiduciaries, are a development of the last hundred years.

The old doctrine of "uses" with all its intricacies gradually gave way to the theory and practice of trusts. Uses, as they existed in England prior to the enactment of the Statute of Uses, designated the result of a conveyance to one on a special confidence reposed in him that he would permit the one, for

whose benefit the conveyance was actually made, *i. e.* the *cestui que use,* and those whom such *cestui que use* might appoint, to receive the profits of the land, and that he would dispose of the land according to the intent of the *cestui que use.* No duty was imposed on the one to whom the conveyance was made other than to fulfil the confidence so reposed in him. The Statute of Uses executed such uses by merging both the legal and equitable estates in the *cestui que use.* Because of this statute and later parliamentary acts, a condition exists in England today very similar to that in this country, where trusts are created imposing an active and positive duty upon the trustee to administer the subject of the trust for the benefit of the *cestui que trust* or beneficiary.

The greater responsibilities being imposed upon trustees by law, the closer supervision being exercised over them by the courts, and the large experience being required of those about to assume fiduciary duties place an added burden on individual trustees and give impetus to the creation and growth of corporate trustees.

OLDEST COMPANY STILL IN EXISTENCE.—The first trust company charter granted in the United States was that granted to the Farmers Fire Insurance and Loan Company by the State of New York in 1822. While the name of that company was later changed to the Farmers Loan and Trust Company of New York, it is still engaged in business in New York City.

The earlier companies engaged in either fire or

life insurance in addition to the trust business, and some also engaged in the title insurance and abstract business. The trust business was at first considered as incidental to the main purpose for which the corporations were chartered and as a business which might not be a source of profit. In Pennsylvania, even now, in order to obtain a charter, a prospective trust company must incorporate as a title insurance company and then, by filing a certain stipulation and complying with certain other requirements, acquire the right to do a trust business. As a general proposition trust companies, state, and national banks not only conduct a trust business strictly as such but in combination therewith do a general banking business and, in some instances, also a title insurance and trust business. Some states, however, by law, restrict the conduct of trust business or the exercise of trust powers to those corporations which are organized solely for that specific purpose and, in some instances, to banks doing a savings and loan business.

GREATEST DEVELOPMENT IS IN THE UNITED STATES.—In the United States we find the greatest development of the business of corporate fiduciaries. Such institutions may also be found in England, Germany, Canada, Australia, New Zealand, and Japan but, aside from Canada, are mostly engaged in what is known as corporate trust business, that is, in acting as trustees for corporate bond issues and the like. In New South Wales, Tasmania, and New Zealand, personal trusts are admin-

istered by an individual appointed by governmental authority and known as the public trustee; in Queensland a similar official is called the public curator. In some of our states we have so-called public administrators. Some of the older British banks have undertaken trust functions, but the idea of a corporate fiduciary has not made the progress with the people abroad that it has in the United States. As is always the case, fixed traditions and established habits give way slowly and reluctantly to newer and what often seem revolutionary methods.

The adoption of the Federal Reserve Act conferring upon national banks the right to exercise trust functions, subject to state control, increased trust facilities and thus tended to give a great impetus to the trust business, and many national banks took advantage of this special opportunity to enlarge their activities.

Prior to the adoption of the Federal Reserve Act, and since, trust companies generally developed with the growth of financial centers of the country and were, and are, in the main, managed by men of experience familiar with trust business. The same may also be said generally of trust activities of those national banks which, since the adoption of the Federal Reserve Act, have taken advantage of the right to carry on a trust business.

RELATIVE ADVANTAGES OF INDIVIDUAL AND CORPORATE FIDUCIARIES.—The foregoing suggests a comparison of individual

as distinguished from corporate fiduciaries. The advantage of having an individual as an executor or trustee is the likelihood of having one who has a personal and intimate knowledge of the decedent's affairs, who is acquainted with the family and proposed beneficiaries of the decedent or settlor of the trust, and who has perhaps only one trust to administer and will therefore give it closer and more particular attention than would a corporation, with its many and diverse trusts to manage. The disadvantages, especially in this day and generation, when the settlement of estates and the administration of trusts have become so complex, will be very apparent if but a moment's consideration is given thereto. First, we have the difficulty of choosing a proper person and one equipped to act as an executor or trustee; often he is an old business friend who cannot conduct his own business as he should and at the same time perform his duties as such fiduciary. One activity must suffer. A bank or trust company, on the other hand, is fully equipped to administer the trust imposed upon it and was created for that special purpose. Again, an individual trustee may be subject to the personal influence of one or more of the beneficiaries and be embroiled in conflicts of policy or management. When there is more than one individual trustee, lack of agreement often causes confusion and loss. With a corporation such influence does not affect its actions because it is impersonal toward all beneficiaries. While it will hear the views of all, its decision is an independent

one, based on the facts, unbiased and unprejudiced. When it comes to the matter of attention to the necessary details of administration, such as keeping accurate accounts, payment of taxes, proper conversion of securities at the appropriate time, distribution at the earliest moment possible, individual fiduciaries rarely measure up to the standards established by corporate fiduciaries. Often an almost ideal situation is created when an individual, such as a man's wife, his son, or his business associate of many years, is appointed as a coexecutor or other fiduciary with a corporation. Banks and trust companies ordinarily welcome and do not oppose such associates in the administration of estates or trusts. As to the relative amount of the fees, commissions, and so forth, chargeable by or payable to individual or corporate fiduciaries, there is no legal difference. In some instances individuals act without charge, but such cases are few. Banks and trust companies are reasonable in their charges and render full service. However, when one gives due consideration to the qualifications which should be possessed by an individual undertaking to settle an estate or administer an estate, the conclusion is almost inevitable that one about to make his will or create a trust, particularly if a large amount of property is involved, will choose a corporate fiduciary to undertake such work. It would be both unfair and partial not to give full credit to those individuals who have faithfully and with great credit and by indefatigable labor administered the many, large, and often com-

plicated estates entrusted to their care. Such, unfortunately, is too often not the case. An unbiased study compels the conclusion that corporate fiduciaries are best qualified to handle trusts of all kinds and that their administration thereof, with very few exceptions, has been most advantageous and profitable to the beneficiaries. This very important phase of trust activities has been discussed widely and often.

Scope of Book

Generally speaking, this book will be divided into a discussion of personal trusts, corporate trusts, and the organization of a trust department, all preceded by a brief discussion of property and its transfer by death or by placing it in trust under a deed or other instrument.

Under personal trusts, the following will be considered:

Administration of estates of intestates
Administration of estates of those leaving wills
Administration of trusts under wills
Guardianships
Committees or conservators or curators
Investments
Taxation
Accounting
Administration of trusts under deeds (living or voluntary trusts)
Insurance trusts

Agencies
Escrows

The above subdivisions are very general and will be more fully treated later.

Under corporate trusts, the following will be considered:

Trusteeships under corporate mortgages, equipment trusts, and the like
Registrarships
Transfer agencies
Depositaries
Fiscal agencies
Voting trusts
Reorganizations

Under organization of a trust department, a brief outline of the relation of officers and departments will be given with a few words relating to their duties and their part in the work.

A few forms will be inserted in the text where applicable.

DEFINITIONS.—As an aid to the reader in the better comprehension of the terminology of the text, it will be well for him to study and get clearly fixed in his mind the following definitions:

Trust—An obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully and according to such confidence. (See previous definitions in this Introduction.) "A trust, in its technical sense, is the right, enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another."—Bispham.

Intestate—A person who dies, having made no will, or one which is defective in form and is not probateable. It also applies to a case in which a man fails by his will to dispose of all his property, in which case he is said to "die intestate" as to the property not so disposed of.

Administrator—A person designated by law to administer the estate of a decedent who has died intestate.

Administrator cum Testamento Annexo—A person designated by law to administer an estate when no executor is named in the will of a decedent or when the one named dies or is incompetent or is unwilling to act.

Administrator de Bonis Non—A person designated by law to administer an estate when the first appointed administrator has died or has been discharged before having fully administered the estate of an intestate decedent.

Administrator de Bonis Non, cum Testamento Annexo—A person designated by law to administer an estate under a will when the executor dies or has been discharged leaving a part of the estate unadministered.

Administrator Pendente Lite—A person designated by law to conserve the estate, pending a controversy over the will or the right of appointment.

Administrator durante Absentia — A person designated by law to administer an estate under a will during the absence of the executor and until he has proved the will.

Administrator ad Colligendum—A person designated by law to collect and preserve assets of the deceased, pending appointment of an executor or administrator. A very special class.

Administrator durante Minore Aetate—One who has been appointed to administer an estate in which the person who has been named as sole executor by the will is still under age and, therefore, legally incapable of serving until of proper age.

Ancillary Administrator—One who has been appointed to conduct a local and subordinate administration of such part of the assets of a decedent as are found in a state other than that of which the decedent died a resident.

Will—A legal declaration of a person's wishes regarding the distribution of his property to take effect after his death.

Testator—One who has made a testament or will.

Guardian—One who legally has the care and management of the person or the estate—or both—of a child during his minority. The minor in such cases is known as the "ward" of such guardian.

Committee—A guardian appointed to take charge of the person or estate—or both—of one who has been found to be *non compos mentis* (not of sound mind, memory, or understanding).

Conservator—The name given in some states to a person appointed by a court to manage the estate of an incompetent or lunatic in much the same way as a guardian administers the affairs of a ward.

Curator—One legally appointed to take care of the interests of one who, on account of his youth, or defect of his understanding, or for some other cause, is unable to attend to them himself. The relationship is in the nature of a guardianship.

Surrogate—A term used in some states to denote the judge to whom jurisdiction of the probate of wills and the grant of administration and of guardianship is confided. In some states he is called surrogate; in others, judge of probate, register, judge of the Orphans' Court, and so forth. He is ordinarily a county officer with a local jurisdiction limited to his county.

Register of Wills—See Surrogate.

Surrogates' Courts—See Probate Courts.

Probate Courts or Courts of Probate—Courts which have jurisdiction of the probate of wills and the regulation of the management and settlement of decedents' estates, as well as a more or less extensive control of the estates of minors and other persons who are under the especial protection of the law.

Trustee or Fiduciary—A person or corporation in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another. "To a certain extent, executors, administrators, guardians, and assignees are trustees, and the law of trusts so far is applicable to them in their capacity of trustees." (Hill, Trusts, 49.)

Cestui Que Trust or Beneficiary—He for whose

benefit another person is seized of lands or tenements or is possessed of personal property. He who has a right to a beneficial interest in and out of an estate, the legal title to which is vested in another.

Executor—The person or persons to whom another commits, by his last will, the execution of that will. A person to whom a testator, by his will, commits the *execution,* or putting in force, of that instrument and its codicils.

Deed—A writing or instrument written on paper or parchment, signed, sealed, and delivered, to prove and testify the agreements of the parties whose deed it is, to the things contained in the deed. A written instrument under seal, containing a contract or agreement which has been delivered by the party to be bound and has been accepted by the obligee or covenantee.

Mortgage—A conveyance of real estate or assignment of personal property, made without parting with the possession in either case, by way of hypothecation as security for the performance of some act, usually the payment of money; and treated, at law, as a conveyance or assignment but, in equity, as a lien. The conveyance of an estate by way of pledge for the security of debt, such conveyance to become void on payment of it. (4 Kent, 136.)

Settlor or Trustor—Generally, one who created a trust by deed, the grantor in a deed of trust, or in an agreement creating a trust.

Estate—In its most extensive sense, it is used

to signify everything of which riches or fortune may consist, and it includes personal and real property; hence, we say "personal estate" and "real estate." In its restricted sense it signifies the quantity of interest which a person has in lands or any other subject of property, from absolute ownership down to naked possession.

Dower—The provision which the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children. Under the common law of England and the law of most states, it consists of a life interest in one-third of the lands of which the husband was seized in fee, at any time during coverture, and in which she had not, by proper procedure, released her rights. In some states dower has been abolished.

Curtesy—An estate for life which a husband takes at the death of his wife, having had lawful issue by her born alive during coverture (marriage), in all lands of which she was seized in fact of an inheritable estate during coverture. In some states, issue of the marriage is no longer necessary; in others, curtesy has been abolished by statute.*

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*The foregoing definitions, with certain slight changes in phraseology wherever it seemed proper, have been taken from what appeared to be the most applicable definitions appearing in Bouvier's Law Dictionary (Rawles Third Revision).

CHAPTER I

Property As the Subject of a Trust

ALL trusts must have some subject or thing upon which to operate. This subject or thing is property. As a trust does not operate to direct or control the actions of persons apart from property, there can be no valid trust unless there is some property or property right involved.

HOW PROPERTY RIGHTS ORIGINATED. —A reasonable understanding of the origin of the law of property and property rights is a necessary prerequisite to a grasp of the operation of trusts upon such property and property rights.

The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. It consists in the free use, enjoyment, and disposal of all of a person's acquisitions, without any control or diminution save only by the laws of the land. (1 Blackstone 138; 2 Blackstone 2, 15.)

The word is also commonly used to denote any external object over which the right of property is exercised. In this sense it is a very wide term and includes every class of acquisitions which a man can own or have an interest in. (Lawrence v. Hennessey, 165 Mo. 659.)

Property, the thing itself, or the *res,* also comprehends in its broader significance the right in property, or the *jus in re.*

The first thing that strikes the imagination is the origin and development of that right which a man has in a thing or collection of things, a right which is so superior that he is justified in defending it against all others, and a right which the laws and courts stand ready to protect against all invasions.

Originally, the world was without human inhabitants, and therefore there was no one to claim possession of anything against any one else. Even when there were but few inhabitants and there was more than enough for all, the right to anything was considered a right common to all. No one's use of property conflicted with another's, or as the historians of the olden days had it: "All things were common and undivided, as if there were but one patrimony for them all." It was considered that everything was held in common until one person appropriated a part thereof to his own use, with the further understanding that, if the possessor gave up such article, any one else could seize it, as it had again become common to all. All of this is clearly set forth in Blackstone's Commentaries, Book II, where we also find these observations: "Thus also a vine or tree might be said to be in common, as all men were equally entitled to its product, and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who

compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own." According to more recent writers, however, the first form of property was the ownership in common of families and tribes, from which ownership in severalty came as a later development, as appears from a note to Blackstone, Book II, citing Brantly on Personal Property, Sec. 124 (1891).

As the population of the world increased and civilization developed and as the needs of men and their several activities increased and became more complex and diversified, more permanent rights in property began to be recognized. As Blackstone very tersely put it: "Necessity begat property; and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants—states, government, laws, punishments, and the public exercise of religious duties."

It is quite generally agreed among students and writers on the subject that occupancy, the taking and retaining possession of the property, either land or movables, was the origin of the title a man had in the property he claimed as his own. (See Blackstone, Book II, which is earnestly recommended to the student desiring a fuller understanding of the development of the law of property. See also 2 Kent's Com., and the writings of Puffendorf, Grotius, and other distinguished historians and publicists.)

RIGHTS OF DISPOSAL OR TRANSFER.—Assuming the right of property or the right to retain possession of a particular piece of land or a particular article, the next consideration is the right to dispose of the same or to transfer such property. Originally, in order to retain title, a man was compelled to keep possession of a thing. The moment he gave it up, it became common property again and any one else could seize it. This giving up was called abandoning possession. Whereas such a doctrine would apply during the early stages of civilized life, it could not do so long, and a method was soon developed whereby one in possession of a particular thing, having no further use for it and desiring to exchange it, was permitted to do so. The result was that methods of transfer or deeds were developed. The transfer having been effected, the new owner becomes such by taking possession of that property, the possession of which another had permitted him to take. (Cited in a note to Blackstone, Book II.) "A man had a right to enter by virtue of his deed and hold the premises against his grantor by force of the statute, and as no other person had any legal title or claim, he could maintain that right against all mankind." (French v. Gray, 2 Conn. 99 Day, 1916.) From the above doctrine of occupancy we have the common expression of "Possession is nine points of the law."

ABANDONMENT OF PROPERTY BY DEATH.—Another method of abandoning property, and a most universal one, was by the

death of the occupant. Upon such death both the possession itself and the intention to retain possession ceased simultaneously. The property, thus previously possessed, upon the death of the occupant immediately again became common property subject to seizure and occupancy by another. In a state of civilization, however, such a doctrine could not long subsist, and very soon after governments were established it became the law of almost every nation to permit the heirs of the deceased, as designated by law, to step in and continue that occupancy which their predecessor, by death, had perforce abandoned. It was also generally provided that, if no heir could be found, the property would revert to its common state, that is, it escheated to the state. "The state takes to herself all the lands of which any person shall die seized of an inheritance, intestate and without any known heir." (See Code c. 69.) The right to inherit property was, therefore, not a natural right but a legal right existing only by virtue of the law of the land. The right to dispose of property by will is also a legal right and is strictly governed by law, both as to formality of execution and as to the extent to which it will be allowed to prescribe the distribution of property.

Incidentally, it may be of interest to note that the right of inheritance or descent to children and other relatives of a decedent seems to have preceded, by quite some period, the right of disposition by will or testament.

Of still later development was the idea of trusts, in which the right to the beneficial enjoyment of property was held by one individual and the legal title and possession was held by another. Courts of law refused to recognize or to enforce such an arrangement, leaving as the sole recourse of the beneficiary his appeal to the good faith and conscience of the one holding the title and possession. It remained for the King, then for courts of chancery, and now for courts of equitable jurisdiction, generally, to enforce the administration of the trust according to the dictates of the conveyance which created it. It is now generally recognized that a trust can be created by a man to take effect either during his own life, by deed or assignment, or after his death, by will; and that such a trust, unless it violates a positive rule of law, will be enforced.

KINDS OF PROPERTY.—The origin and development of property and property rights and the transfer or disposition thereof having been thus briefly considered, some thought should also be given to the different kinds of property and how they may be transferred or disposed of. "The objects of dominion or property are *things* as contradistinguished from *persons:* and things are by the law of England distributed into two kinds: things *real* and things *personal.* Things *real* are such as are permanent, fixed, and immovable, which cannot be carried out of their place; as lands and tenements; things *personal* are goods, money, and all other movables which may attend the owner's per-

son wherever he thinks proper to go." (See Blackstone, Book II, Chap. 2.) Or, as is now more generally stated, the two kinds of property are: real estate or lands, on the one hand, and, on the other hand, personal property, such as money, goods, bonds, stocks, jewelry, clothing, mortgages, notes; in fact, all kinds of property other than real estate.

DISTINCTIONS IN CASES OF REAL AND PERSONAL PROPERTY.—It is necessary to keep in mind clearly the distinction between real estate and personal property. Under the laws of most states, real estate is said to *vest* in the heir-at-law or devisee immediately on the death of the owner. *Personal property* belonging to such owner (except in some jurisdictions) must, on the other hand, first be administered; that is, applied to the payment of debts, taxes, administration, and other costs, and then—after all these items are fully discharged—to the payment of legacies and finally distributed to those entitled to the general residue of the estate. In other words, the personal property of a decedent is, in most cases, the primary fund for the payment of debts, taxes, administration, and other costs, and such personal property must be exhausted before the real estate owned by the decedent can be called upon to contribute; however, subject to differences in the law and practice of the several states, it may be laid down as a general proposition that real estate, unless needed to pay debts, taxes, administration, and other costs, or legacies charged on the real estate, either specifically or by operation of law, belongs at

once to the heir-at-law or devisee; and, subject to such burden or contingency, he can dispose of it immediately on the death of the owner. From this statement it follows, as a necessary corollary, that an administrator or executor has no jurisdiction over real estate and cannot assume charge thereof except as an agent for the heir-at-law or devisee, who, on the death of the former owner, immediately becomes the new owner, unless such real estate is needed for the purpose aforesaid, or unless the will specifically directs the executor to take charge of the real estate or to sell it and distribute the proceeds. In some states, however, no distinction is made between real and personal estate as to vesting, and the title to the real and personal estate, on the death of the owner, passes immediately to those entitled, subject only, however, to administration.

A trust, therefore, created by a deed or other similar instrument, takes effect immediately upon the execution and delivery thereof. A trust created by will, if created with respect to real estate and subject to the above limitations, takes effect immediately on the death of the testator. If, however, such trust created by will relates to personal property, it does not become effective until the estate is administered and the share of the estate applicable to the trust is duly awarded or paid over to the trustee.

To enlarge on the above, it may be stated that with reference to real property especially, it was said: "The law abhors an hiatus"; in other words, a

gap in title. It is legally inconceivable that the title to real property is ever unvested or in a state of pause on its way to an owner; hence the statement that real property vests immediately on the death of its owner, whereas personal property needs to be administered. Further, there is the origin of the law. Under the feudal system and customs, the ownership of real property involved certain obligations, as, for instance, rendering of military service to the lord of the manor; therefore, real property passed immediately on the death of the owner to his male descendants who could render this service. For this reason it may be said that the title of a person to real property was a qualified one and therefore such real property could not be subjected to his debts. Personal property alone was subject to debts and therefore was taken possession of by the personal representative, the administrator, or the like, to be administered by him.

The law of property, the rights of property, and the power of disposition over the same, having been given this preliminary consideration, one may proceed at once with the study, as outlined within the scope of this book, of the administration of estates of intestate decedents and the execution of trusts of all kinds. This is not now the rule however. To enable the personal representatives to pay the debts of their decedents, "the title to all the personal property of the decedent is vested in them in all cases; as well as, under English and American statutes, a power contingent upon the insufficiency

of the personal property, over the real estate" (see Woerner, The American Law of Administration, Third Ed. Sec. 355). Again "It is a rule, universally admitted, that the personal estate is the natural primary fund for the payment of debts contracted by the deceased himself, which will be first applied until exhausted, unless the testator expressly or by implication directs otherwise. . . ." (see Sec. 489, Woerner, supra.)

CHAPTER II

Wills

BEFORE entering into a discussion of the administration of estates under wills, which discussion would seem logically to follow the preceding chapter, it is requisite for the students to know something about the history, development, and preparation of wills and the execution and revocation thereof, and also to know something concerning the various limitations and restrictions affecting the disposition of property by will.

As intimated in Chapter I of this book, the right of inheritance or descent antedated by quite some time the right to dispose of or give away property by will.

FUNDAMENTALS OF WILLS TO BE DISCUSSED.—The subject of wills is a complex one, and quite a number of textbooks and treatises have been written dealing therewith. Innumerable decisions of the courts of the several states, appellate as well as courts of original jurisdiction, have been handed down in the years past, so that there is a large volume of law dealing with the subject of wills and the interpretation thereof. Only a number of the fundamental principles will be discussed, leaving to the student, so desiring, the opportunity for further research, to acquaint himself with the niceties and intricacies of judicial interpretation and discussion.

"Every man should make a will." How very often you have seen and heard that statement. It is as true and applicable now as it was in the days when men were first permitted to make wills. Why it is so often not done, it is hard to say. It will not seem amiss here to state that it is the duty of every one handling trust business to urge upon all the clients of his organization, as well as every one he can influence, the advisability of making a will at once and of going to his lawyer to have this vitally important document prepared.

QUESTIONS ARISING IN THE MAKING OF A WILL.—The questions naturally arising regarding this subject are, generally: Who may make a will? By whom and how shall such will be drawn? How shall it be executed and attested? How can it be revoked? How is it proved at the testator's death?

It may be stated, as a general proposition, applicable in all states, that any person of full age, of sound and disposing mind, memory, and understanding, may make a will. In some states persons not of full age may make wills. If the age limit is less than twenty-one years, it is usually fixed at eighteen years. As an illustration, in New York a boy of eighteen years may give away personal property by will but may not dispose of real estate; similarly, a girl sixteen years of age may make such a will. The student must become acquainted with the statutes of his own state to know who may make wills there.

PROVISIONS FOR WIFE OR HUSBAND.—In several of the states, a man's right to give his property away by will is subject to the rights therein of his wife, which he cannot take away. In others, a restriction is placed upon the wife, who cannot distribute her property by will in violation of her husband's rights. In either case, if such wills are made, either the courts voluntarily—that is, of their own motion—award to the surviving husband or wife, as the case may be, the property to which he or she is entitled; or, such survivor may elect to take against the decedent's will the property or rights which are his or hers by law, and the courts, upon proper petition, will award the applicant such property or rights. Generally, in those states where dower still exists, if the deceased husband has made by will some provision for the widow expressly in lieu of dower, the widow then may elect whether to take under the will the provisions made for her, or to renounce the will and take her dower. She cannot take both. If no express provision is made in lieu of dower, she is not deprived of that right, and any devise made of real estate is therefore made subject to her dower rights. In some states the same is true of the surviving husband's right to curtesy. If the decedent made a will attempting to ignore such rights or estates, the will is simply ineffective with respect thereto, the same as if it had never been written.

THE QUESTION OF SANITY.—Assuming the person making a will—that is, the testator—is

of proper age, the next question which arises is: Is he of sound and disposing mind, memory, and understanding? In other words, is he sane?

One of the greatest lawyers of his day, John G. Johnson, of Philadelphia, Pennsylvania, outlined his idea of a person having testamentary capacity, that is, a person of sound and disposing mind, memory, and understanding, as one who knew what he had, to whom he wanted to give it, and what he wanted to give to each such one. These fundamentals might all be disturbed if the testator were legally insane, feeble-minded, or in a state of drunkenness, or if fraud or undue influence were used to warp his intention and disposition into a channel different from that into which they would have traveled had he been free from such influences.

The question of what degree of insanity or feeble-mindedness would so warp a man's judgment at the time he made a will, or what would constitute an influence strong enough to move him away from his natural desires regarding his property is very difficult to outline, and the subject has been dealt with so much and so widely that it is impossible to do more than state the applicable principle as follows: Any condition of mind, due to physical causes or any influence brought to bear by any one outside which makes it practically impossible for a testator to exercise his own rational judgment in dealing with his property, would, if clearly proved, prompt the court, upon proper application, to set aside the will made by such testator.

DRAWING THE WILL.—Having considered who may make a will, the next thing to take up is: How and by whom shall a will be drawn? It will be assumed that all admit the advisability that everybody should make a will disposing of his property; first, because he will thus be reasonably sure that his wishes, with respect to his property and who shall receive the same, will be carried out; and second, because it gives the testator the opportunity to appoint some one in whom he has confidence to administer his estate instead of having it settled by some one he himself might never have appointed.

There can be but little objection made to the statement that all wills should be drawn by a competent lawyer after careful consultation with the proposed testator and after due consideration has been given to the wishes of the testator.

The following is suggested as a basis for securing data for the will of a client prior to his consulting his counsel relative to the preparation thereof:

DATA TO BE SECURED WHEN CONFERRING WITH A PERSON REGARDING THE DRAWING OF A WILL

Full name of testator
Address or domicile
Are all debts and funeral expenses to be paid
Provision for purchase of burial lot
Special provisions regarding funeral
Provisions for erection of tombstone
Provisions for upkeep of cemetery
To whom are the personal effects, such as furniture, jewelry, and so forth to be given
As to automobile

Legatees and relationship	Address	Articles to be received

Cash provision for wife : when to be paid
Legacies to be given

Legatees and relationship	Address	Amount

In whom does title to home and other real estate stand
Disposition of homestead
Is wife or husband to have right to occupy homestead free of rent
If so, who is to pay taxes, water rents, repairs, and insurance
How long
Payments to be made monthly For months, beginning on
Trusts to be established

Beneficiaries and relationship	Address	Interest in trust
.		
.		

NOTE: Above to be set forth fully and in detail
Are any beneficiaries to have power of appointment
What is to happen if all of testator's immediate family are wiped out before the trusts are ended

Inheritance, succession, and similar taxes
How are they to be paid
Out of what part of the estate
As to legacies
As to life estates
As to cemetery or other special trusts
Provisions for holding minors' shares under trusts
Spendthrift trust provisions
Is business of testator to be sold
Is business of testator to be incorporated If so, at what capitalization, and so forth
Investments Are they to be confined to "legal" investments
Trustees to take other than "legal" investments for trustees

Powers to be conferred on executors
  Set forth in detail
Powers to be conferred on trustees
  Set forth in detail
How are stock dividends to be treated As income or as principal
Powers with respect to real estate
  Rights to lease; to sell; to mortgage; to exchange; to square; to dedicate for streets
  Right to purchase real estate
  Are executors and trustees to have similar powers as to real estate
Who are to be executors

Names	Addresses	Relationship

Who are to be executors if first executor dies
Who are to be trustees

Names	Addresses	Relationship

Who are to succeed as trustees if first trustee dies
Who are to be guardians of minor beneficiaries

Names	Addresses	Relationship

Commissions to be paid executors, trustees, guardians
  On income To executors, % To trustee, %
    To guardians, %
  On principal To executors on settlement of estate %
                To trustees at termination of trusts %
  How are commissions to be shared or divided if there are several executors
  Trustees or guardians
Are discounts received on sale or redemption of bonds purchased below par to be credited to principal or to income
Are premiums paid on bonds purchased above par to be charged to income
Or to principal
Are trustees to pay income to others if any particular beneficiary happens to become temporarily or permanently incapacitated and unable to receipt for income
If so, to whom

Are trustees to be authorized to pay out a part of the principal of a trust fund held for any person, to meet some special emergency, as cost of operation, expenses due to illness, and so forth
If so, how much

Special provisions for payment out of principal of trust for education of beneficiary If so, how much

Application of income payable to minor beneficiaries for the maintenance, education, and support of such minors during minority

Provisions or reference to be made for or to after-born or subsequently adopted children

NOTE: Other information, or such impressions or observations as will be helpful, as, for instance

Age of testator
Name of wife Her age
Names of children : When born?
:
:
:
:

Character of business conducted by testator

LITIGATION CAUSED BY DEFECTIVE WILLS.—The litigation occasioned by defective wills drawn by individuals themselves, with all the attendant delays and large outlays for fees, court costs, and the like, indicates the wisdom of having a competent lawyer draw a will. His fee will be modest indeed as compared with the cost of possible litigation in case the will is "home-drawn." It is stated that one of the best friends a lawyer has is the man who draws his own will.

THE MANNER OF CHOOSING AN EXECUTOR.—Before touching upon the question of how the will should be drawn—that is, the form thereof—it would seem timely to say a few words regarding

the choice of an executor. In the brief historical sketch at the beginning of this book, the relative advantages of a corporate fiduciary as distinguished from an individual fiduciary are outlined. A further word of caution might well be added here, namely, that whether an individual or a corporate executor is appointed, or both, care must be used to select a person of integrity and ability and one who can devote the proper time to the task of administration. Should the person so appointed decline or be unable to act, it will become necessary for an administrator to be appointed by the probate court; probably one whom the testator, had he realized the situation, would never have chosen to settle his estate. Again, care must be taken to see that such a corporate fiduciary is appointed as is qualified and equipped to handle the estate. If individuals and a corporation are named jointly as executors of a will, they should be chosen with some regard to their acting in harmony and cooperating with each other. It must also be kept in mind that the death of an individual executor, either before or after he assumes the administration of any estate, occasions expense, delay, and inconvenience; all of which are avoided ordinarily by the choice of a corporate executor.

THE QUESTION OF THE FORM OF THE WILL.—As to the form of a will, it may be stated briefly that wills vary in form from a few words to most lengthy, intricate, and involved documents. As to brevity, it was the author's privilege to have been instrumental in probating a will in the Regis-

ter of Wills' office of Philadelphia County, Pennsylvania, which was written on the back of a small visiting card. It was the will of Theodore G. Harres, who died in 1907, and reads as follows:

All I die possessed of or entitled to I will and bequeath to my mother absolutely.

It is signed, "Theodore G. Harres" and the date is, "1/14/92." This will was probated June 28, 1907 and is on file in the Register of Wills' office aforesaid, and reference thereto will be found in John Marshall Gest's book on Practical Suggestions on Drawing Wills and the Settlement of Estates, at page 46 (edition of 1909).

The following copy of the will of Henry P. Davison, a member of the firm of J. P. Morgan and Company is a fairly comprehensive illustration of a will dealing with the average situations confronting one having a large and varied estate:

I, Henry P. Davison, of Locust Valley, Nassau County, New York, do hereby make, publish and declare this instrument as and for my last will and testament, hereby revoking all other and former wills and codicils by me at any time heretofore made.

FIRST—I direct that all my debts, funeral and testamentary charges shall be paid as soon after my decease as may conveniently be done.

I also direct that all succession or inheritance taxes which may be levied or assessed against my estate and the legacies, life estate and devises hereinafter set forth shall be paid out of my residuary estate.

SECOND—I give and bequeath to my wife, Kate Trubee Davison, all of my personal effects and jewelry, wherever located, and also the household furniture and equipment, pictures, works of art, silver, ornaments, bric-a-brac and supplies, which are located on the premises known as No. 690 Park Avenue, Borough of Manhattan, City of New York, for her own use absolutely and forever.

I also give and bequeath to my wife, Kate Trubee Davison, my automobiles and all equipment relating thereto, and my yachts, together with all their contents and equipment.

THIRD—In token of my regard and affection for my daughter-in-law, Dorothy Peabody Davison, and my son-in-law, Artemus L. Gates, I give and bequeath to each of them the sum of $5,000.

FOURTH—Section 1. I give and bequeath to my Secretary, William C. Heinkel, the sum of $20,000.

Section 2. I give and bequeath to my wife's secretary, Levina E. Oliphant, the sum of $10,000.

FIFTH—All the rest, residue and remainder of my estate, both real and personal, of whatsoever nature, and wheresoever situated, of which I shall be seized and possessed, or to which I shall in any way be entitled at the time of my death, including any lapsed legacies, I give, devise and bequeath to Bankers Trust Company of the City of New York, in trust, nevertheless, to invest, reinvest and keep the same invested and to collect, recover and receive the rents, issues, income, interest and profits thereof, and, after deducting all proper charges incidental to the administration of the trust, to pay the same in quarterly instalments of equal amounts or as nearly equal as possible to my wife, Kate Trubee Davison, for and during the term of her natural life,

Upon the death of said Kate Trubee Davison I direct that said trust shall thereupon terminate and the Trustees shall assign, transfer, deliver and pay over the principal of said trust as follows:

1. To my son, Frederick Trubee Davison, the sum of $4,500,000 (which at his option may be paid either in cash or in securities at their market valuation on the date of delivery), together with all shares of stock of Peacock Point Corporation, a New York corporation, which were held in said trust, and I give and bequeath the same to him accordingly. In the event that said Frederick Trubee Davison shall then be deceased, I give and bequeath said legacies of $4,500,000 and said shares of stock of Peacock Point Corporation to his executors or administrators in their representative capacity as such.

2. All the rest, residue and remainder of the said trust fund in equal shares to my three children, Henry P. Davison, Jr., Alice Davison Gates and Frances Pomeroy Davison, or to such of them as shall then be living, and to the issue of such of them as shall then be deceased, such issue taking per stirpes not per capita, and I give, devise and bequeath the same to them accordingly.

SIXTH—Inasmuch as I have otherwise provided for my sister, Mary Davison Le Braz, and for my wife's sister, Alice Trubee Sallmen, I make no provision for either of them under this my will.

SEVENTH—I have made no provision in this my will for my household servants and employes inasmuch as I have expressed to my wife and to my children my wishes in regard to the matter of showing my appreciation of their loyalty and faithful service to us.

EIGHTH—The provisions of this will in favor of my wife, Kate Trubee Davison, are in lieu of dowers and all other rights or interest in and to my estate.

NINTH—I authorize and empower my executrix and executors, or the survivors or successors of them, and my trustee as follows:

Section 1. To sell, mortgage, lease and convey all or any part of my estate, both real and personal (except the stock of Peacock Point Corporation), at such times and upon such terms and conditions as they may deem best in order to carry out the provisions of this my last will and testament, giving and granting to said executrix, executors and trustees full power and authority to make proper conveyances and transfers of my estate, both real and personal.

Section 2. At the risk of my estate and without responsibility to my executrix, executors and trustees, to continue and in their or its discretion to turn over as part of the shares of my estate hereinbefore given, devised and bequeathed and in the erection of the trust herein created, any stock, bonds or other securities in which at the time of my death any portion of my estate shall be invested.

Section 3. In any such case in which my executrix, executors and trustees are required, pursuant to the provisions of this will, to divide any portion of my estate into parts or shares or to distribute the same, I authorize them or it, in their or its discretion, to make such division or distribution in kind, or partly in kind and partly money, and for the purpose of such allotment the judgment of my executrix, executors and trustees concerning the property thereof and the relative value for the purpose of distribution of the securities so allotted, shall be binding and conclusive on all persons interested in my estate.

Section 4. At the risk of the trust estate, and without responsibility to my trustee, to continue to hold any stock, bonds or other securities in which at the time of my death any portion of my estate shall be invested, although the same shall not be of the character authorized by the laws of the State of New York for trust investment, and likewise to have full power and authority to dispose of, call in and change any and all investments (except the stock of Peacock Point Corporation), and to invest and reinvest

in any stock, bonds or other securities which in its discretion may be deemed safe and for the best interest of my estate, and said trustee shall not be restricted to securities of the character authorized by the laws of the State of New York for trust investments.

Section 5. I hereby expressly direct my executrix and executors to assign and transfer to my trustee hereunder as part of the principal of the trust created under Article Fifth, all shares of stock of Peacock Point Corporation which I may own at the time of my death, and I expressly direct any trustee to hold such shares of stock during the trust period and not in any event to sell or otherwise dispose of said shares of stock, or any part thereof, and upon the termination of the trust to assign, transfer and deliver the stock of said corporation, or the stock of any successor corporation to my son, Frederick Trubee Davison, or to his executors or administrators in their respective capacities as such, as provided for in Subdivision 1 of Article Fifth hereof.

Section 6. I expressly authorize my executrix and executors in their absolute and uncontrolled discretion, to settle, compromise and adjust any and all claims in favor of or against my estate.

TENTH—My executrix, executors and trustees are expressly authorized in their or its discretion to allot or appropriate any funds or money belonging to my estate which may be allowed or permitted to remain in the business of J. P. Morgan & Co. under agreements by and between the partners thereof, or otherwise, to the trust created under this will.

ELEVENTH—

Section 1. In case of securities taken or purchased for the trust fund at a premium, my executrix, executors and trustee shall not be bound to set aside any part of the income thereof as sinking fund to retire or absorb such premiums.

Section 2. I further authorize my said executrix and executors, or my trustee, in their or its discretion, to vote in person or by proxy upon all stocks or other securities held by them; to exchange the securities of any corporation or company for other securities issued by the same, or by any other corporation or company at such times and upon such terms and conditions as my executrix and executors or my trustee shall deem proper; to consent to the reorganization, consolidation or merger of any corporation or company, or to the sale or lease of its property, or any portion thereof, to any person, corporation or company, or to the lease by any person, corporation or company of his or its property or any

portion thereof, to such corporation or company and upon such reorganization, consolidation, merger, sale or lease to exchange the securities held by it for the security issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the executrix, executors or the trustee may deem expedient for the protection of their or its interest as holders of any stocks, bonds, or other securities of any corporation or company, and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or to take advantage of any rights to subscribe for additional stocks, bonds or other securities, and to make any and all necessary payments therefor and generally to exercise with respect of all stocks, bonds or other investments held by the executrix, executors or trustee hereunder, all rights, powers and privileges as are or may be lawfully exercised by any person owning similar property in his own right.

TWELFTH—I direct my executrix and executors to accept any statement which may be furnished or submitted by the firm of J. P. Morgan & Co., of which I am a member, as to any interest which I may have at the time of my death in said firm of J. P. Morgan & Co., or as to any sums of money, if any, that may be due me from said firm. Such statement shall be final, conclusive and binding upon my said executrix and executors, and my estate, and any person or party interested therein, and shall be accepted without question. Such statement may be of such character as may be determined upon by the said firm of J. P. Morgan & Co., and may in their discretion cover and refer to any amounts which may be due me either as a member of said firm, or otherwise.

THIRTEENTH—The words "executrix" and "executors" whenever used in this will shall be construed to mean the executrix and executors hereinafter named, or the one or more of them who shall qualify, or the survivors or survivor of them, and their successors and successor.

FOURTEENTH—I hereby nominate, constitute and appoint my wife, Kate Trubee Davison, and my sons, Frederick Trubee Davison and Henry P. Davison, Jr., as executrix and executors to this, my last will and testament.

I hereby nominate, constitute and appoint Bankers Trust Company, of the City of New York, trustee of the trust herein created.

I hereby give and grant unto my said executrix, and executors and trustee the amplest and fullest powers to enable them to carry into effect and to accomplish the purposes under this, my will, and I ex-

pressly order and direct that no bonds or other security shall be required in any jurisdiction of my said executrix, executors or trustee for the faithful performance of their respective duties hereunder.

In testimony whereof, I have hereunto set my hand and seal this Twenty-seventh day of April, in the year of One Thousand Nine Hundred and Twenty-two.*

HENRY P. DAVISON

The foregoing instrument, consisting of seven typewritten pages, was on the day of the date thereof signed, sealed, published and declared by Henry P. Davison, the testator therein named, as and for his last will and testament in the presence of us, the undersigned, who, at his request, and in his presence, and in the presence of each other, have hereunto set our names as witnesses; this clause having been first read to us, and we now intending to certify that the matters herein specified took place in fact and in order herein stated.

George B. Case, Englewood, N. J.
Leonard Hull Smith, 8420 Eleventh Avenue, Brooklyn, N. Y.

James J. McDermott, 1030 Hoe Ave., New York City.

Generally speaking, a will should contain the name and domicile of the testator; it should contain a statement to the effect that he revokes all former wills and that the present one is his last will and testament; it should direct payment of debts and funeral expenses and then dispose of the balance of the estate. A will should also contain a final or concluding clause indicating that the testator affixed his hand and seal in confirmation of the provisions

*This will was copied from the wills appearing in Lewis Preparation and Construction of Wills, 1926 Edition, p. 934 *et seq.*

stated in the body of the will. This concluding clause usually reads as follows:

IN WITNESS WHEREOF, I have hereunto set my hand and seal this day of A.D. 19 .

The statutes of most states provide that all wills must be in writing and signed by the testator at the end thereof. The student is urged to acquaint himself with the statutes of his state relating to wills and the requirements with respect thereto. With possibly a few exceptions, no state has attempted by statute to deal with the question of the form a will shall take. Wills are therefore as varied in form as the whims of mankind.

EXCEPTIONAL KINDS OF WILLS.—It might be interesting at this juncture to refer to certain exceptional kinds of wills. Two of these are most generally discussed; first, the holographic will, or one which is entirely in the testator's own handwriting; and second, the nuncupative will, or one made by word of mouth to two or three witnesses and usually reduced to writing as soon as possible and in the exact words of the testator, or as near thereto as may be. Such wills are usually permitted only in the case of soldiers on duty or sailors on the high seas, and they are effective as to personal property only, and not as to real property. The formalities necessary to a valid nuncupative will, the circumstances under which it may be made, and the nature and amount of property with respect to which it may be operative are prescribed by the sta-

tutes of the several states. The doctrine of nuncupative wills seems to have come to us from the Roman law, under the provisions of which soldiers, at the time of battle, were permitted to declare, in the presence of witnesses, the disposition they desired to have made of their property. These declarations were subsequently reduced to writing by the witnesses.

Another class of wills differing from the usual is that of the mystic will, which is one sealed in an envelope in the presence of witnesses. Under the laws of a few states, reflecting the French and Spanish law, the mystic will requires no other attestation than as above, as is also the case with a holographic will, which, as above stated, is one entirely in the handwriting of the testator.

With the two exceptions noted, wills may be written, printed, or typewritten, or a combination of writing, printing, and typewriting.

EXECUTION AND ATTESTATION OF THE WILL.—Having considered the form of wills, we naturally reach the questions of the execution and attestation thereof. Both of these questions are usually vitally important. Except in the case of nuncupative wills, all wills must be signed by the testator, and his signature thereto, or his execution thereof, must be duly witnessed or attested. In this connection the student should ever keep in mind the distinction recognized in some states between "attesting witnesses" and "subscribing witnesses." In some states where the distinction exists, attest-

ing witnesses are those who attest to—that is, witness the execution of an instrument—but who do not necessarily subscribe their names as witnesses to the instrument attested, and subscribing witnesses are those who both attest an instrument and also subscribe their names thereto as witnesses. As a general proposition, however, "attesting witnesses" and "subscribing witnesses" are interchangeable terms.

SIGNING THE WILL.—The statutes of most states provide that a will shall be signed by the testator, at the end thereof, and in the presence of two or more competent, credible, and at the same time disinterested witnesses, the testator declaring to them that the instrument he signed is his last will and testament, although it is not ordinarily necessary that the contents of such will be made known to such witnesses. The declaration by the testator that the instrument being executed is his last will and testament is known as the publication. The witnesses must know at the time they affix their signatures that the instrument is the will of the person whose signature they are witnessing, and the testator himself must have so declared. The signature of the testator may be in lead pencil or in ink or other material making a legible impression on the instrument. In cases of physical disability a testator may execute his will by his mark, although this may give rise, in some cases, to difficulties when an attempt is made to prove the will. The proposed witnesses should be present when the will is signed.

The following is considered the most comprehensive attestation clause:

> Signed, sealed, published, and declared by the above-named testator, John Doe, to be his last will and testament, in the presence of us, who, in his presence and at his request and in the presence of each other, have all hereunto subscribed our names as witnesses hereto.

An analysis of the above clause will show that the testator and each and all of the witnesses are present during the execution of the will and during the process of the affixing of the signatures of the witnesses. All the states do not require the above formality, but it is a safe course to follow. The statutes of the several states vary as to the number of witnesses required.

In some states it is required by law that witnesses set out their place of residence when witnessing wills, and this under pain of a penalty if neglected. It is good practice in all cases to note the residence of witnesses beneath their signatures. It is an aid, when you come to prove the will, both in locating witnesses and in identifying them. As above mentioned, some states require three witnesses to a will, some only two. As it is better to have too many rather than too few, it might be considered good practice always to have three witnesses attest a will.

COMPETENCY OF WITNESSES.—The competency of persons to act as witnesses to wills must always be carefully kept in mind. The competency of witnesses is determined as is the com-

petency of a testator, as of the date of the execution of the will, and not as of the date of the probate of the will. If the witnesses or the testator or both were *sui juris*—that is, competent—at the time the will was executed—subsequent insanity or incompetency will not invalidate the will if it is otherwise valid.

It is the general rule that persons benefiting by a will are not competent to act as witnesses thereto. The point, however, is governed by local laws, and the rules and decisions are consequently varied. Some states hold that when a legatee under the will also acts as a witness, he is competent to prove the will but the bequest to him is void. Some states hold that an executor named in the will has such an interest in it that he is incompetent to act as a witness; other states hold the opposite. It was held in one state, where all the earnings of each of the partners went into the partnership accounts, that the partner of an executor was incompetent to act as a witness. Under the last holding, it was held that a stockholder in a trust company named as executor was incompetent. These last holdings are harsh in their treatment of the subject and have not been generally accepted. Many states have specific statutes regulating the subject. It is a good practice to follow to use as witnesses only those persons who are so credible and disinterested that no question of their competency can successfully be raised.

No subscribing witnesses are required in some states except where real estate is being disposed of

or where there are gifts to charitable institutions. In Pennsylvania, for instance, no attesting or subscribing witnesses are necessary except when a disposition is being made to a charitable or religious institution, in which case the will must be witnessed by two credible and at the same time disinterested witnesses who must have subscribed their names as witnesses to said will. In New York and New Jersey the statutes require that the testator shall, at the time of signing his will, declare to the witnesses present that it is his last will and testament, and they must sign their names thereto in his presence.

The decisions dealing with the proper execution of wills, the sufficiency of the attestation thereof, the sufficiency of the publication, the disqualifying interest of witnesses, and the like, are quite numerous and complex. A study thereof would be most enlightening to the student who might be interested in the subject.

THE QUESTION OF WHERE TO KEEP THE WILL.—The will having been drawn, signed, published, and witnessed, the next question which arises is, where to keep it. Ordinarily the safest place to keep a will is in the safe deposit box of the testator or in the custody of the corporate fiduciary which is appointed to act as executor or trustee. Testators should not keep wills in their homes or offices. When placing them in safe deposit boxes or in the custody of depositaries, copies of the will should be retained by the testator with a record

of the place where the original can be found. It is not good practice to execute wills in duplicate and to keep them in several places, as complications may arise in the event of revocation, by destruction of the one and overlooking the destruction of the other.

CHANGES OR ADDITIONS TO THE WILL.—If the testator changes his mind or conditions change, he may decide to make some other disposition of his property. This can be done in two ways; first, by revoking his present will and executing a new one; or, second, by executing a codicil to his present will. The latter will be discussed first. A codicil may be briefly defined as an addition or supplement to a will, executed with as great formality as the will itself. By this method, simple changes in disposition of a testator's property may be effected without the necessity of having an entirely new will executed. The more formal method of effectuating a different disposition of the property of a testator is for him to revoke his present will and to execute an entirely new one. In this connection it must be kept in mind that a will is ambulatory—that is, changeable—and therefore that a will is said not to take effect until the date of the death of the testator, as until that time he may, if legally capable, make a new will or change the old. We always speak of the last will and testament. In some states a will speaks as of its date with respect to the property disposed of therein and does not include after-acquired property, even though it is the universal

rule that the will does not take effect until the death of the testator. With these considerations in mind, it may be said that any act of the testator indicating an intention to revoke and annul his former will is sufficient, but there must be the *animo revocandi* or "intention to revoke" present, and there must be an actual act performed in furtherance of the intent. Sometimes this is done by the testator's stating in his new will that he revokes and annuls any and all wills theretofore made and executed by him; in other instances, he burns, or tears, or otherwise cancels his old will or specifically directs some one else to do so in his presence. There has, however, been much litigation arising out of attempted revocations, incompleted cancelations, accidental burnings of wills, and analogous instances, in which the question has been raised as to the sufficiency of the revocation or the real intent of the testator, and the student is directed to a study of the decisions of his particular state in this regard. In many states the statutes prescribe what will be a sufficient revocation.

LEGAL REVOCATION OF A WILL.—There is another method of revocation of a will, and that is effected by law. In practically every state it is provided by statute that marriage of the testator after making a will revokes that will, either wholly or to the extent of the interest the surviving spouse would take if there were no will. At common law this rule applied only to the subsequent marriage of females making wills, but in the United States it is applied

to males as well, either generally, or if, in addition, there is issue born of the marriage. Also, it is generally provided by statute that as to children born after the execution of a will and not provided for therein, the will is ineffective, and such after-born children not provided for are entitled to take such share in their parent's estate as they would have taken under the intestate laws had he never made a will. The will is not thereby revoked, and it will control the disposition of all the estate remaining after each child's share has been set aside for him. However, as a man may disinherit his children, which intention to disinherit must be clearly shown by his will, he may so prepare his will that after-born children will be barred from participating in his estate or will be considered as sharing equally with the testator's other children. This is generally done by using such words as will indicate that the testator clearly intended to disinherit all his children, born or to be born, or clearly intended that his will should apply alike to all his children, born or to be born.

ASSUMPTION OF THE LAW AS TO ENTIRETY OF PROPERTY.—The law presumes that testators intended to dispose of all their property by their wills; in other words, that they died testate, and every reasonable presumption will be indulged in to uphold the will as a complete disposition of property. Any property not disposed of by a will passes under the intestate law and in such case a man is said to die intestate as to such property. If

there is a residuary clause in a will by which the testator disposes of all the "rest, residue, and remainder" of his property, "including any gifts which may have lapsed," there is practically no possibility that an intestacy will occur; hence all wills should contain such a provision.

THE PROBATE OF THE WILL.—The next subject to be discussed relating to wills is that of the proof or probate thereof, in connection with which the question of setting aside, or what is popularly known as "breaking" of wills, will also be considered.

It will be recalled that in the introduction of this book, reference was made to the fact that the term "probate court" when used herein will include all bodies or individuals having supervision of the settlement of estates and kindred matters. It includes, too, of course, registers of wills, surrogates, and the like. This is also referred to in Chapter IV on the Administration of Estates of Deceased Persons.

When a person who has made a will dies, the first step, so far as said will is concerned, is to have the same proved or probated. It must be remembered that when a decedent's will is spoken of here, it is always assumed to be his last will and testament, as that is the only one which is effective. Sometimes it happens that what is the last will in point of date may be legally not the last will of the decedent because it has been revoked by him or because it was executed under such circumstances as

to render it ineffective and void. In the first instance, as a general rule, the next prior will to the one revoked cannot be resorted to as the last will unless the testator has republished it. This rule, however, has certain complex exceptions and the student sufficiently interested is referred to the various decisions on the subject for a study thereof. As to the second instance above referred to, it is said that a will executed under undue influence is no will at all, and therefore the will of the decedent next prior in date to the one declared void will be considered to be the last will of the decedent in question. If, in the first instance, the next prior will has not been republished, or if, in the second instance, there is no prior will, the decedent will be considered to have died intestate, and his estate will have to be administered accordingly.

CITATION OF AN ILLUMINATING EXAMPLE.—For the purpose of illustration, a brief summary of the result of a peculiar state of facts and of the law applicable thereto might be interesting to the student. Admiral George W. Melville, a resident of Pennsylvania, by his will made certain disposition of his property among various relatives and others and later, by a codicil, made provision for the establishment of an institution or home for disabled sailors, devoting practically his whole estate to that object. He died March 17, 1912, but, unfortunately for his pet project, within one calendar month of the date of the codicil. Under the laws of Pennsylvania dealing with gifts for chari-

table purposes, the gift failed and the codicil became ineffective because it was executed less than one callendar month prior to the admiral's death. The question arose whether, the codicil being ineffective, recourse could be had to the will in so far as the portion of the Admiral's estate covered by the codicil was concerned. After a long legal battle, the Supreme Court of Pennsylvania finally decided that the codicil having, in effect, practically revoked the whole of the will, such will was not revived by the fact that the codicil, otherwise in good form, became ineffective by reason of the Admiral's death too soon after its execution. (See Melville's Estate, 245 Pa. State Reports, page 318 [May 11, 1914].)

Having the last will of a decedent before us, the first step is to present the same before the proper probate court or officer, for probate or proof. Under the statutes of several states, a heavy penalty is imposed on those who, having the custody of wills of decedents, suppress them or fail to submit them for probate. It is generally conceded that if all the parties in interest agree, being of legal age and competent to contract, and if the proper inheritance taxes, debts, and all other proper charges are paid, a will may be kept from probate or ignored. This, however, is not a safe course to pursue and may lead to many unfortunate consequences. Cases may arise in which a decedent, who has made a will, leaves practically nothing upon which such will can operate. In such instances one might be excused for

not incurring the expense incident to the probate of such a will and its incidental proceedings.

The will in question should be presented for probate to the probate court of the county and state of the decedent's residence. "Probate," more particularly speaking, is the act of the proper officer, upon due proof of the testator's death and due execution of the will, declaring that the paper offered as the last will is the last will of the decedent in truth and in fact, and further declaring that the same shall be admitted to probate. The will should be offered for probate by the executor named therein. As a general rule, the original will and codicils are presented to the probate court with a petition signed by the executor, setting forth the name of the decedent, his legal residence or domicile at the time of his death, the date and place of his death, of what property, real and personal, he died seized or possessed, and requesting or praying that the paper or papers accompanying the petition and declared to be the last will of the decedent, be admitted to probate. In some states, as, for instance, Pennsylvania, the probate is proceeded with immediately; in others, as, for instance, New Jersey, a certain time must elapse after the death of the testator before the will is probated; in other states, notably New York, when the petition for probate is filed, the issuance of a citation or order is also asked for, to be issued by the court and directed to all parties in interest, notifying them to appear at a certain time and show cause why the probate of the will should not be pro-

ceeded with and the estate administered. The proceedings for probate of wills in the several states being, in detail, quite varied, the student is requested to familiarize himself with the law and practice of his state, as it is practically impossible to mention more than a few general rules. Usually the witnesses to the will in question are examined, under oath, by the probate officer, as to the facts of the execution of the will. If the probate officer is satisfied, by such proof, that the will is the last will of the testator and was duly executed by him, and that, at the time of the execution thereof, he was of sound and disposing mind, memory, and understanding and was not acting under compulsion or undue influence, he will order the will admitted to probate, and it thereupon becomes a public record of that court. If the will is admitted to probate, the probate officer usually then requires that the executor take an oath—and in some states he must likewise file a bond—that he will faithfully perform his duties as such executor, pay all debts, taxes, and so forth, and in due course file an accounting of his administration of the estate of his testator. All this being done in due form, letters testamentary are issued to the executor, which constitute his authority to proceed with the settlement of the estate.

The remarks in Chapter IV dealing with the issuance of letters of administration and of certified copies thereof and of so-called short certificates, and with the method of certification of such letters and of the record incident thereto, and with the author-

ity of the administrator to act in a state other than that in which he was appointed, all apply with equal force (subject to obvious differences) to issuance of letters testamentary to executors and to their extra-territorial powers, and it is deemed unnecessary to repeat them at length here.

The powers, rights, and duties of executors after the grant to them of letters testamentary will be taken up in the chapter entitled Administration of Estates of Deceased Persons.

VARIOUS INCIDENTAL QUESTIONS.—It would not be proper to leave this subject without calling attention, briefly, to a number of questions incident to wills and the probate thereof.

The subject of setting aside or "breaking" wills presents a very complex question and one requiring a most exhaustive consideration to treat adequately. It is generally done by instituting a proceeding to have the will judicially determined of no effect because of the incompetency or other disability of the maker of the will; or because of the improper execution of the will; or because of the invalidity of certain of its provisions; or because the will contravenes the rule against perpetuities or the statutes against accumulations (which will be discussed in a later chapter); or for other reasons. The proceedings are usually instituted by disgruntled heirs or those honestly believing they are being deprived of their just portion of the estate of their relative; they are expensive and long-winded proceedings and only quite rarely successful. As some one has aptly

said: "We all get the idea that it is an easy and simple matter to 'break a will.' . . . The truth is that it is harder to break a will than it is to break any other human contract. In the entire history of the State of Illinois, fewer than ten wills have been 'broken' by the Supreme Court." (Referred to in Conyngton on Wills and so forth, Third Edition.)

EFFECT OF SETTING ASIDE OF WILL.—If the will is set aside the property of the decedent or testator will pass under the intestate law, just as if no attempt had been made to execute a will.

DUTY OF EXECUTOR TO FILE A BOND.—In some states all executors must enter bond or give security for the faithful performance of their duties; in some states only non-resident executors need to give such security; again, in other states, no security at all is required, particularly if the testator, by his will, directed that no such security should be required. While a testator may make such a provision, it is not binding on the probate court; in fact, it may be stated in passing that the probate court is not bound to issue letters testamentary to the executors appointed by the testator; it may, in the exercise of its sound discretion, if it believes the executor named is unsuitable or incompetent, decide to authorize some totally different persons to administer the estate.

DISTINCTION BETWEEN PERSONAL AND REAL PROPERTY IN A WILL.—Another matter to be kept in mind is that the devolution of

personal property of a decedent is governed by the law of the decedent's domicile, whereas that of real estate is governed by the law of the state wherein the real estate is situated. Duly certified copies of wills should be filed in every county and state wherein real estate owned by the decedent is situated.

If, for any reason, a will is not admitted to probate, or if part thereof fails, or if the testator does not dispose of all of his property by his will, then, as to that part of the decedent's property, real or personal, which is not disposed of, he is said to have died "intestate," as has already heretofore been mentioned and discussed, and such property will need to be administered or will vest accordingly.

Under the laws of practically every state as expressed in the decisions of the courts, both of original and appellate jurisdiction, it is declared to be the duty of an executor to uphold the will of his testator if the same is attacked or if proceedings are instituted to set the same aside. While this may involve no active duty on the part of the executor or require him to incur any unusual expense for costs, counsel fees, and so forth, in an effort to sustain a will, it does require that the executor should not sit idly by and do nothing in the event that the will is attacked. (The decision of the Orphans Court of Alleghany County, Pennsylvania, in the case of Snyder's Estate, 1 D. & C. 513 [1922] is enlightening on this subject.)

The author is firmly of the opinion that all wills

should be prepared by competent lawyers representing proposed testators. The various practical and legal questions discussed in this book are taken up, not with the thought that any student other than a member of the bar should be fitted to prepare wills, but solely for the purpose of so familiarizing the student with these questions that he can discuss them intelligently when a proposed testator is conferring with him regarding his will, prior to the preparation of the will by his counsel. It is hoped that the student will ever keep this thought in mind when using this book.

CHAPTER III

Gifts, Including Legacies and Devises—Limitations

A GIFT under a will, if of personal property, is called a legacy, and the person taking is called a legatee. If the gift is of real estate it is called a devise and the taker, a devisee. The persons who take as legatees or as devisees may be the same persons who would have taken as heirs-at-law had the testator died without making a will. If the beneficiary under a will is a stranger, he may take as a legatee or devisee, but he is not an heir-at-law. An heir-at-law may take more or less under a will than he would have taken under the law of descent; if so, he takes as legatee or devisee but not as heir-at-law. This distinction may have some effect on the rights of beneficiaries under wills, and it is well to keep it in mind. There are a number of kinds of legacies. A brief description is given in the following paragraphs.

GENERAL LEGACIES.—General legacies are those in which the money or property given is to be taken from the general personal property of the estate. Such legacies are paid from the whole personal estate after the payment of debts, and if there be a deficiency, such legacies are said to be abated; that is, all such legatees take *pro rata* (proportionately, according to rate or proportion). No such

legacy bears interest until the period of probate has expired, with certain exceptions.

SPECIFIC LEGACIES.—Specific legacies are those in which some specific thing is given as distinguished from any other; as, for instance, a particular security by name, a particular fund of money. As a general proposition, if the testator at his death does not own the specific thing given, the legacy fails, or is said to be adeemed. These legacies have priority over general legacies as to the things specifically given. The legatees in such cases are entitled to the produce of such legacies during the period of administration; as, for instance, dividends on stock given, or interest on mortgages given, or increase of live stock.

DEMONSTRATIVE LEGACIES.—Demonstrative legacies are those which provide for the gift of money payable out of a specified fund, such as out of a certain fund in a named bank or institution. These also generally fail if the testator, at his death, leaves no such fund. In some states, however, it is held that such legacies are payable out of the general estate if the specific fund fails for any reason.

CUMULATIVE LEGACIES. — Cumulative legacies are those which are added to previous legacies to the same person.

RESIDUARY LEGACIES.—Residuary legacies are those which include all personal property not previously disposed of.

LAPSED LEGACIES.—Lapsed legacies are

those which fail because the legatee, as, for instance, the brother of the testator, died prior to the testator. It is the general rule that lapsed legacies fall into the residue. In some states, as, for instance, in Pennsylvania, it is provided by statute that when such legacies are willed to a certain class of persons, they shall not lapse if such persons leave issue, saving, however, to the testator, the right to direct otherwise. If there is no such law or if the testator does not direct otherwise, and if his will contains no residuary clause, such legacies will pass as intestate property to the next of kin of the testator.

CONDITIONAL LEGACIES.—A testator may attach a condition to his legacy; as, for instance, that the legatee shall take only if, at the testator's death, he resides at a certain place, or only if he shall have arrived at a certain age. These gifts may be characterized as "conditional legacies."

METHOD OF PAYING LEGACIES.—All legacies are payable out of the general personal property of a testator, and the real estate of such testator is not liable therefor unless such legacies are specifically charged on said real estate by the testator himself or are deemed to be a charge thereon by law, as is the case in some states. Eliminating for the present all consideration of estate, succession, inheritance, and similar taxes, the practical application of the above rule may be thus illustrated: A testator died leaving personal property amounting to $30,000 and real estate worth $50,000; and the legacies amounted to $40,000, while the

debts, expenses, and allowances equalled $10,000, leaving a net personal estate of $20,000. In such case, if the legacies were not charged against the real estate and it was devised free of such charge, such devisees would take the real estate free of the legacies, and they, the legatees, would have apportioned among them the net personal estate of $20,000. Such legatees therefore would each receive only twenty-fortieths (50%) of their legacies.

PRECATORY WORDS.—There is another more or less common practice with reference to legacies and gifts under wills, namely, the use of so-called "precatory" words; as, for instance, a legacy reading as follows:

> I give to my wife, Mary Brown, all my stock in the Fouave Iron Company. I request her to pay one-half of the income from said stock unto my sister, Sarah Smith, each year during her life;

or,

> I bequeath $1,000 to my brother John. It is my wish that he give half of said sum to my nephew, Samuel, if he is living at my decease.

The word "request" in one case and "wish" in the other case are called "precatory" words, and while ordinarily they are treated merely as a recommendation they may be construed to impose an absolute obligation on the legatees to carry out the requested provisions. If it is intended to make the gift optional only with the legatee, it would be better to say, after the primary gift, "If my wife thinks best, I suggest to her the thought of paying one-half of the income . . ." and similarly in the case of the legacy to the brother.

CASH LEGACIES OR LEGAL INVESTMENTS PLUS INTEREST.—In addition to the above observations regarding legacies, it may be stated as a general proposition that, while specific legatees are entitled to receive and can demand only the thing specifically bequeathed to them, other legatees may demand cash or they may take securities at the market value at the time of distribution, plus accrued interest. Distributions to trustees or to those acting in some other fiduciary capacity should ordinarily be made in cash or in so-called "legal investments" at the market value at the time of distribution, plus accrued interest. This whole matter of distribution by administrators, executors, and trustees will be treated more fully in another chapter.

COMPLICATIONS OF DISPOSAL OF PROPERTY.—The question of the limitations upon a man's right to dispose of his property in any way he sees fit is a very complex one, and much law has been written upon the subject. It can only be barely outlined here, and then only with the thought of inspiring the interested student to further study and investigation. An old saying has it, that: "A man may do as he will with his own"; but that must immediately be qualified with the proviso that such gifts do not run in violation of any rule or law relating to disposition of property by the owners thereof.

There are, broadly speaking, only three such limitations. First, there are the rights which surviving spouses cannot be deprived of by will;

second, the statutes forbidding improper accumulations; and third, the rule against perpetuities.

RIGHTS OF SURVIVING SPOUSE.—In almost every state, by law, certain rights are conferred upon husbands and wives in each other's property, both real and personal, of which they cannot be deprived by the other by will. Some of these rights had their origin in the adoption of the feudal system in England, in part brought into this country by the early settlers; others arise under other systems of law; while others, again, are of more modern origin. Where such rights are recognized, the surviving spouse, if a direct or indirect attempt has been made by the deceased spouse to deprive him or her thereof, may assert his or her right against such will and have awarded to himself or herself the same share in the deceased spouse's estate as he or she would have taken under the intestate laws. There are certain exceptions, in certain states, to this rule, and each student is referred to the statutes and decisions of his particular state.

ORIGIN OF LAWS LIMITING ACCUMULATIONS.—The laws forbidding improper accumulations, or statutes against accumulations, seem to be almost wholly of English origin. It was originally possible to accumulate income for a period equivalent to the period permitted under the rule against perpetuities, *viz:* during a period of a life or lives in being and twenty-one years thereafter. Eventually, in England, a man named Peter Thelusson, who died in 1797, so managed, under a trust, to

dispose of his estate, amounting to more than $3,000,000, that it would accumulate for a period of from seventy-five to a hundred years, at the end of which time it was to go to some remote descendant who would have been the richest man in the world. The will was upheld, but as a result of this case, known generally as the Thelusson's Case, Parliament passed a bill limiting accumulations to a term of twenty-one years after the testator's death. (39 and 40 Geo. III. C. 98, generally known as "Thelusson Act.")

CITATIONS IN FICTION AND FACT.—As an extravagant illustration of the possibilities of accumulations of wealth, if unduly permitted, the student is referred to H. G. Wells' book entitled, When the Sleeper Wakes. In this book Mr. Wells has made use of the above law and depicts his hero, a young man of great wealth, falling into a protracted trance or sleep. His physicians put him into a glass case at an even temperature where he is nourished and supplied with pure air. As he sleeps, a board of trustees is selected to manage his property and keep it intact. The subject sleeps for several centuries. By that time he has become the possessor of all the existing wealth of the world, and his trustees form a combination to rule the earth. Then the hero awakes! But that is another story. One of the judges of the supreme court of one of our states, in setting aside a will providing for accumulations over a longer period than that permitted by law, said that the value of the estate at the end of

the period would be measured in a figure beyond his mental comprehension.

Several states, as, for example, New York, California, Illinois, Pennsylvania, and others, have passed rather stringent statutes against accumulations. The one in force in Pennsylvania is cited here for the purpose of illustration:

No person or persons shall, after the passing of this act, by any deed, will, or otherwise, settle or dispose of any real or personal property, so and in such manner that the rents, issues, interest, or profits thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or testator, and the term of twenty-one years from the death of any such grantor, settler, or testator, that is to say, only after such decease during the minority or respective minorities, with allowance for the period of gestation of any person or persons, who, under the uses or trusts of the deed, will, or other assurance directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues, interest, and profits so directed to accumulate, and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void in so far as it shall exceed the limits of this act, and the rents, issues, interests, and profits, so directed, to be accumulated contrary to the provision of this act, shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed: Provided, That any donation, bequest, or devise, for any literary, scientific, charitable, or religious purpose, shall not come within the prohibition of this section, which shall take effect and be in force, as well in respect to wills heretofore made by persons yet living and of competent mind, as in respect to wills hereafter to be made: And provided, That notwithstanding any direction to accumulate rents, issues, interests, and profits, for the benefit of any minor or minors, it shall be lawful for the proper court as aforesaid, on the application of the guardian, where there shall be no other means for the maintenance or education, to decree an adequate allowance for such purpose but in such manner as to make an equal distribution among those having equal rights or expectations, whether at the time being minors or of lawful age. (Laws of Pennsylvania of 1853, April 18; P. L. 503, Sec. 9.)

INCOME AND INTEREST ARE KEPT DISTINCT.—It is generally conceded, where the statute applies, that even when the income is allowed to be accumulated, it never loses its character as income, but, at the expiration of the period, it must be distributed to some one as income. In other words, although the income may be held and accumulated for a limited period, it can never be added to the principal. A noted exception to the statutes against accumulations is the case of accumulations for charities. These accumulations of income, to be eventually added to the principal, the augmented sum to be a fund for a charitable use or purpose, are permitted for a reasonable period. The case of the gifts of Benjamin Franklin to the City of Philadelphia and the City of Boston may be cited as prominent cases in point.

It must be noted that when there is a provision for accumulations contrary to law, only the excess fails; the trust itself is not affected. That is, the trust will go on as provided, but the income will be paid to the persons who would have taken it, as if the accumulation had never been provided for.

RULE AGAINST PERPETUITIES.—The next limitation on a testator's power of disposition is known as the rule against perpetuities. It is generally recognized to be a rule of law rather than, strictly speaking, a law. This rule, also of English origin, grew out of a determination to thwart the continued effort on the part of many landed families in England to keep their properties in their families

indefinitely by so tying them up that no one in succession could dispose thereof. It was said by the court, in the Duke of Norfolk's case (1 Vern. [Eng.] 164), that a "perpetuity is a thing odious in the law and destructive to the commonwealth; it would stop commerce and prevent the circulation of the riches of the kingdom."

The rule, as generally stated, is that no estate shall be so limited or held in trust that it will not vest—that is, become the absolute property of the ultimate beneficiary so that he can dispose of it by will, deed, or otherwise—within a period not longer than a life or lives in being at the inception of the trust and twenty-one years thereafter; or, as more technically stated, "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." (See Gray on Perpetuities.) A trust in violation of this rule may result in the failure of the whole gift.

REFERENCES RECOMMENDED.—It would be folly on the part of any one to attempt, in the few lines which can be devoted to the subject, to discuss with any degree of completeness or accuracy this most complex rule of law. In order to acquire an adequate understanding of the subject, the student is referred to Mr. Gray's work on Perpetuities, also Lewis' work on the same subject, both of which have for years been recognized as the standard textbooks on this subject and are almost universally used and quoted. It is also suggested

that the student familiarize himself with the statutes and decisions of his own state dealing with the subject. In some states, the rule in its application is modified by statute, especially with reference to the lives to be used in measuring the period and also as to the period to be added after the falling in of the life estates. Some states hold that the lives in being may be used collectively; others, that each life must be considered separately. The decisions of the courts of the various states also are not uniform.

The author, in an attempt to have something which might be of practical value in discussing, with those intending to make wills, the limitations which must control their desire to keep their estates intact over a long period, prepared a table intended to show the applicability of the rule against perpetuities to any given case, as it is recognized in Pennsylvania. It is reproduced here for the purpose of illustration, not necessarily as an authoritative statement of the rule.

The fine differentiations between legal and equitable estates and the niceties involved in the various decisions on the subject are referred to here merely to show that they exist, and not to cloud the discussion.

THE RULE GENERALLY EXEMPTS CHARITIES.—As was stated to be the case with reference to the statutes against accumulations, the rule against perpetuities is generally held not to apply to charitable gifts or uses. For the purpose of carrying on a charity—as, for instance, the Girard

HOW LONG PROPERTY CAN BE HELD IN TRUST

Diagram of the period permitted under the "RULE AGAINST PERPETUITIES"

(1)
Date of Death of person making a will or date of deed of settlor

(a) As to all persons, viz:—
wife
husband
children
grandchildren
and all others referred to in will or Trust Deed, living at this date →

Life Period

The Trust may continue not only during the entire lives of all the persons referred to as (a), that is: until the death of the last survivor of such persons, but also on beyond that time and until date (3), that is: until 21 years beyond the date of the death of such survivor.

(1½)
Date of birth of persons not living at date (1).

(b) This class may include children, grandchildren and any others who may be born after date (1).

The *vesting* of Trusts measured by the lives of these persons (b) cannot be continued beyond date (3) regardless of the possibility of such persons designated as (b) living beyond date (3).

(2)
Date of Death of ultimate survivor of the persons (a) living at date (1)

21 year additional period. (This period may be taken "in gross" without reference to lives in being.)

(3)
Date beyond which Trust cannot continue; that is: date *not later* than 21 years after date (2) with allowance for period of gestation.

Note: At this date (3) the share of the ultimate beneficiary must *absolutely vest,* but not necessarily in possession; that is: his or her right to such share must be absolute so it could be sold or be willed or be dealt with as any other property owned.

NOTES—1. Generally stated, the "Rule against Perpetuities" requires that an estate must *vest,* if at all, *within* a life or lives in being and twenty-one years thereafter with due allowance for the period of gestation.

2. The "Rule against Perpetuities" being a technical legal rule, due regard must be paid to the decisions of the Courts applying the Rule to any given set of facts. The above diagram and notations are intended merely as a guide.

Citations: Johnston's Est., 185 Pa. 179 (1898); Lawrence's Est., 136 Pa. 354 (1890); Penrose's Est., 257 Pa. 231 (1917); Whitman's Est., 248 Pa. 285 (1915); Lilley's Est., 272 Pa. 143 (1922); Jones Trust Est., 284 Pa. 90 (1925). Gray on Perpetuities.

Robert Mayer—1925.

College of Philadelphia, an educational institution of international fame, made possible by the provisions of the will of Stephen Girard—a fund may be given to trustees in perpetuity. This will was hotly contested, and the greatest lawyers of the day were employed, some on one side, others on the other, the chief question at issue being whether the purpose intended was a charitable use. The case was finally decided by the Supreme Court of the United States in 1844 in a decision sustaining the will. (See Vidal *et al.*, v. Girard's Executors, 2 Howard, 128; 11 Law Ed. 205.) In this case Horace Binney, a renowned Philadelphia lawyer, in defending the Girard will, defined a charity as "whatever is given for the love of God or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish." This definition met with the approval of the court and was also later approved by the Supreme Court of Pennsylvania in the case of Price v. Maxwell (28 Pa. State Reports, 35) and again by the United States Supreme Court (in Ould v. Hospital, 95 U. S. 311: 24 Law Ed. 450).

CHAPTER IV

Administration of Estates of Deceased Persons

AS was set forth in Chapter I, there can be no trust, as that word is used in this book, unless there is property, real or personal, upon which such a trust can operate.

DEFINITION OF AN ESTATE.—The property, real or personal, of which a person died seized or possessed, is said to constitute his estate. The estate, therefore, of a decedent, is that with respect to which alone a fiduciary relationship may be sustained.

If a will does not relate to all the property of which the testator (the one making the will) died seized or possessed, or if such will does not make a complete disposition of the whole estate, such testator, as to the property not disposed of, is said to have died seized and possessed thereof, intestate, and the principles and practices hereinafter stated apply to the administration of all such undisposed of property as well as to the administration of the ordinary intestate estate.

DISTRIBUTION OF REAL AND PERSONAL PROPERTY.—At this point it seems advisable to mention that in cases of intestacy the property of the intestate decedent is distributable, as to personal property, in accordance with the laws

of descent of the state of which the decedent was a resident at the time of his decease; as to real estate, in accordance with the laws of descent of the state in which such real estate is situate or located. It is sometimes stated colloquially that, in cases of intestacy, the estate or property of the intestate is distributed in accordance "with the will the law has made."

It is not practicable to outline here the laws of descent and distribution of the several states, owing to the fact that such laws vary so much and so widely. In some states, real estate and personal property are treated alike; in others, quite a distinction exists with respect thereto. Dower and curtesy rights are given special consideration in some states, whereas in others both such rights have been abolished. In some states, widows, on the one hand, and surviving husbands, on the other, are given rights of which they cannot be deprived. There are other differences too numerous to set forth at length here. The student is advised to make himself thoroughly familiar with the laws of descent and distribution of his own state and with those concerning the respective rights of widows, surviving husbands, and others, in the estates of testate or intestate decedents.

When a person dies leaving any property—that is, an estate—it immediately becomes necessary for something to be done with respect to such estate; that is, such estate needs to be settled, and the settling of an estate is commonly designated as the

administration thereof. It is the administration of an intestate's estate that will first be discussed, although there is much in common in the administration of both the estates of intestates and the estates of those who leave wills.

ADMINISTRATION OF INTESTATES' ESTATES.—The administration of estates of decedents and the descent and distribution of their property being regulated almost entirely by statute from the very beginning, it follows that the supervision thereof rests in some judicial body or officer. Generally speaking, such bodies are designated probate courts and such officers, probate judges. More particularly, however, we have, in the several states, courts of probate, surrogates' courts, orphans' courts, ordinary courts, registers of wills, and others. In some of the states, certain courts having both law and chancery or equity jurisdiction exercise probate jurisdiction, following in the line of some of the English courts. In those states there are no separate courts of probate jurisdiction, but the regular county, circuit, or superior courts, as the case may be, exercise such jurisdiction in conjunction with their other activities. The presiding officers in the several courts exercising probate jurisdiction are variously spoken of as probate judges, judges, surrogates, or ordinaries. In this text the general term "probate judge" will be used when any of these officers is intended to be designated.

FUNCTIONS INCLUDED IN PROBATE JURISDICTION.—All of the above courts exercis-

ing probate jurisdiction have, directly or indirectly, the custody and control of their records, the custodian being variously known as clerk, register, registrar, or surrogate. In a few instances the probate judge or officer is also the clerk; in such cases, of course, there is but one probate functionary. The student is directed to the laws and practice of his particular state, to learn the several fields of activity or the relative authorities of the clerks or surrogates, on the one hand, and of the probate courts or judges, on the other, as the detailed method of proceeding with the administration of an estate in any particular state will depend largely thereon. The method of procedure outlined in this book must of necessity be treated as general in its broad scope.

THE PETITION IS THE FIRST STEP.—The first step to be taken in the case of an intestate's estate is to apply to the proper probate court for letters of administration or other authority entitling one to administer the estate of his decedent. This application is usually in the form of a petition to the probate court, the surrogate, or the register, setting forth, in general, the name of the decedent, his residence or domicile, when and where he died, of what property, real and personal, he died seized or possessed, and the names of the heirs and next of kin. The forms of petition and the facts to be set forth therein vary greatly in the several states.

PRIORITY IN CHOICE OF ADMINISTRATOR.—The right of a particular person to be appointed administrator is generally fixed by statute

or by practice. Ordinarily, the order of priority is: surviving husband or wife, children, sometimes the oldest son or oldest daughter, other near relative, and, if need be, a creditor. The final determination of the question as to who shall be appointed administrator rests with the probate judge or other authority clothed with power to make such appointments.

In the average case, as above intimated, the person appointed is called the administrator. There are some special cases, however, quite frequently needing to be dealt with; for instance, when the administrator dies before the administration of the estate is completed. In such a case, another has to be appointed to finish the task. He is called the administrator *de bonis non,* or literally translated, the administrator of the goods or property not yet administered. If there should be a controversy relative to the estate at the time of an intestate's decease and a possibility of loss due to the delay, letters of administration, upon application by a creditor or other person interested in the estate, will be granted temporarily to one who is entitled administrator *pendente lite* or "pending litigation." This person is also sometimes designated as a special administrator or an administrator to collect. His duty is merely to collect and preserve the property or assets of the estate and properly to care for the same while in his custody and control. When the controversy is ended and the usual letters of administration are issued, the special administrator

appointed, as above, immediately renders an account of his administration and, in due course, transfers and delivers to the regularly appointed and duly constituted administrator the goods and property then in his hands.

In some states, particularly those wherein there is no resident heir or next of kin of an intestate decedent, provision is made by statute for the administration of the estate of such decedent by an official called the public administrator.

AUTHORITY VESTED BY LETTERS OF ADMINISTRATION.—The evidence of authority of an administrator is called letters of administration. These letters are granted by the probate judge, surrogate, or register of wills, upon petition as above outlined and upon due consideration thereof. The original letters of administration are, in some states, retained by the court for its files and a certified copy or copies delivered to the administrator, a notation of the grant thereof being made on the records of the probate court or in the surrogate or register's office. Any number of certified copies of said letters can be obtained by the administrator or any other proper person needing the same, upon due application. In some instances, the probate court or surrogate issues what are commonly designated as "short certificates"; these are merely brief recitals of the fact that on a certain day letters of administration, in a certain estate of the named decedent, were granted to the person therein designated. These short certificates are usually used

only in the state of the decedent's residence at the time of his death. At the time letters of administration are issued, the person appointed administrator usually takes an oath or an affirmation that he will faithfully administer the estate of his decedent; that he will duly render an account of his administration and make proper distribution of the estate as he may be directed by the court having jurisdiction of his account. In most states, such administrator is also required to give a bond, with sufficient sureties and in such amount—usually double the amount of the estimated estate—conditioned, for the faithful performance of his duties as such administrator. Usually, however, when trust companies act as administrators, they are either permitted to enter their own bond or are entirely relieved, by statute, from entering any security or giving any bond.

ADMINISTRATIVE ACTS IN ANOTHER STATE.—If the administrator desires to act in another state, as, for instance, to transfer stock, he will need to obtain a duly exemplified copy of the petition and grant of letters, in fact, of the entire record, all of which must also be duly certified under one of the following acts of Congress:

SECTIONS 905 AND 906, REVISED STATUTES OF THE UNITED STATES*

905. The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or

admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.*

906. All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district, in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken.*

The right of an administrator to act in a state other than that in which letters of administration were issued is generally fixed and determined by the laws of such other state. As a general proposition, it may be stated that authority granted by one

*These sections now appear as Sections 687 and 688 of Chapter 17 of Title 28 (Judicial Code and Judiciary) of The Code of the Laws of United States of America of a General and Permanent Character, in Force December 7, 1925. The authentication under Section 905, above quoted, is used when dealing with the records of a court, while the authentication under Section 906 is used when dealing with the records of a public office, not, strictly speaking, appertaining to a court.

state for a person to act as administrator has no extra-territorial force; that is, it confers no right on such person to act in another state.

PROMPT APPLICATION IS NECESSARY.—Application for letters of administration should be made as promptly as possible after the death of a person, in order that no time may be lost in the preservation, care, and management of the property or estate of such decedent. In fact, in most states, if the person primarily entitled to take out letters does not do so, others, as, for instance, creditors, are entitled to do so.

ADMINISTRATOR MUST GIVE NOTICE.—Letters of administration having been granted, the first step is for the administrator to give notice thereof, as may be provided either by the statutes or the rules of the probate court or both. Usually this is directed to be done by advertisement, for a specified number of times in certain newspapers or other publications, setting forth, usually, that letters of administration have been granted to the person named, calling on all persons indebted to the decedent to make payment to said administrator, and requesting all persons having claims to present the same to said administrator. In some jurisdictions, notice is also required to be given to the persons who will be entitled to share in the estate of said decedent.

THE INVENTORY.—As soon as possible, the administrator reduces to possession all the personal estate of the decedent and prepares a list thereof

known as an inventory. This inventory should show in detail and by proper description all the property of the decedent which has come to the knowledge or possession of the administrator, as, for instance, the stocks, bonds, jewelry, furniture, all personal effects, mortgages, notes, or other evidences of indebtedness, chattels real, and choses in action. In some states, the property so inventoried must be valued or appraised by persons designated by statute or rules of the court for that purpose, who, under oath or affirmation, promise to make a true and proper appraisement; or, having made such an appraisement, they, under oath or affirmation, aver it to be a true and correct one. In the jurisdiction where this practice obtains, the instrument wherein the list of the property and the valuation thereof appears is called the inventory and appraisement. It becomes the basis of all future dealings with the estate of the decedent in question and, subject to additions or subtractions afterward found necessary, represents the liability of the administrator for an accounting. Such inventory, when the practice of formal appraisement is not followed or required, also contains the true values of the property set forth therein as determined by the administrator, or it sets forth no value at all, leaving that item until the time for accounting arrives. It is customary to include in the inventory a description of all real estate owned by the decedent at the time of his death, even though the administrator exercises no control over it. As a general rule, the inventory

or the inventory and appraisement is filed in the proper probate office and becomes a public record. The following is an illustration of an inventory and appraisement:

INVENTORY AND APPRAISEMENT
ESTATE OF JOHN DOE, DECEASED

Probate Court..... State of.....

Decree of appointment of Appraisers and direction to make Inventory and Appraisement.

Oath of Appraisers that they will well and truly value and appraise the goods and chattels, rights and credits, of John Doe, deceased, and make due return thereof to the Probate Court within..... from the date of the decree.

INVENTORY AND APPRAISEMENT
CASH IN BANK

Balance in checking account in Institute Trust Company.....	$1,000

BONDS

$6,000 of LMN Corporation first and refunding mortgage sinking fund gold bonds dated March 1, 1925, due March 1, 1935, bearing interest at 6% payable semi-annually March 1 and September 1, with interest coupons maturing September 1, 1927 and following attached, at 100.....	6,000
Accrued interest on same March 1 to April 1, date of death..	30
$10,000 of XYZ Corporation first and refunding mortgage sinking fund gold bonds dated January 1, 1925, due January 1, 1935, bearing interest at 6% payable semi-annually January and July 1, with interest coupons maturing July 1, 1927 and following attached, at 90.....	9,000
Accrued interest on same January 1 to April 1, date of death..	150

MORTGAGES AND SO FORTH

$9,000 note of Richard Roe, dated February 1, 1924, due February 1, 1929, interest at 6% payable semi-annually February and August 1, with interest coupons maturing

August 1, 1927 and following attached, secured by first mortgage on property known as No. 14 Maple Avenue, Bankville, Pennsylvania	$9,000
Accrued interest on same from February 1 to April 1, date of death	90
$1,000 promissory note of Samuel Brown dated January 1, 1927, due May 1, 1927, with interest after maturity at 8% per annum, no security	1,000

STOCKS

100 shares preferred stock of A B Company represented by Cert. No. B-478, issued in the name of John Doe, par value $100 per share, at 70	7,000

GOODS AND CHATTELS AND SO FORTH

All household goods, furniture, rugs, and draperies, being the complete furnishings of a five room cottage located at No. 18 Pine Avenue, the residence of the deceased	500

(If all of the household goods and furniture are bequeathed to one individual, as the wife of the testator, and there is no likelihood of there being necessity for the sale by the executor of any part of such goods, a general description such as is illustrated here may be deemed sufficient, but if such goods are to be divided among several people who are to be charged with the appraised value of the articles taken by each, or if specific articles are bequeathed to different individuals, or if it is necessary for the executor to convert such goods into cash, a detailed inventory should be taken and an appraised value placed on every article separately.)

Contents of library, appraised value	320
One diamond ring	250
One diamond stick pin	130
One gold cigarette case	30
One diamond stud, appraised value	300
One gentlemen's open face gold watch, Hamilton movement	50
One pair of gold cuff links set with small diamonds	50

MISCELLANEOUS

$1,000 life insurance policy No. 478528 issued by the Institute Life Insurance Company, payable to the executors of the deceased	1,000
Total	$35,900

Taken and appraised by us as above

WILLIAM GREEN :
WALTER STRONG : Appraisers

Oath by appraisers that above is a true and correct inventory and appraisement.

Order or decree directing that the above be accepted and filed.

THE RULE REGARDING A CHATTEL REAL.—The general rule is that a chattel real, that is, an interest growing out of or annexed to realty, including estates for years, is regarded as personal property and, as such, passes to the administrator and not to the heirs. Thus, a leasehold for a definite number of years, even a ninety-nine year lease, is personal property and goes to the administrator. This rule is true even in states where by statute the widow is entitled to have dower assigned to her in leases for a specified number of years, or more, as in real estate. (Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo., 414, 125 S. W. 486, 20 Ann. Cas., 1072.)

Letters of administration having been granted, the granting thereof having been duly advertised, and the inventory or inventory and appraisement having been made up and filed, the actual settlement or administration of the estate really begins.

HOW THE ESTATE IS SETTLED.—Among the first steps, usually the first step, is reduction by the administrator of personal property of the decedent to possession. This procedure will be more fully explained in another paragraph.

There are two fundamental principles applicable to the descent and distribution of property; one

with respect to personal or movable property, the other with respect to real or fixed property. According to these principles or doctrines, it is declared that "personal property must be administered" and that "real property or real estate vests in the heirs-at-law or devisees immediately upon the death of the owner thereof." It is important to keep these two principles always in mind in considering the administration or settlement of a decedent's estate. There are various differences in the several states regarding the practical applicability of the above stated principles, but basically they are recognized almost everywhere.

RULING ON PAYMENT OF DEBTS IS BASED ON FEUDAL CUSTOM.—As we have seen, during the feudal period in England, land was granted in consideration for service, notably military service, to be rendered an overlord; the occupant did not have an unqualified ownership and the land was not subject to the payment of his debts. Personal property only was subject to debts. This custom is the foundation for the modern rule that personal property constitutes the primary fund for the payment of debts and that only on its exhaustion can resort be had to the real estate. Thus, it will be seen that ordinarily real estate needs no special administration but passes directly to the heirs-at-law or devisees, as the case may be. The title of the heirs is not clear, however, until the administration has been completed, because until that time the real estate is subject to sale by the

administrator to pay debts. The title taken by the heir immediately upon the death of the decedent is therefore a contingent title which becomes absolute only upon the final settlement of the administration proceedings. The statutes of the respective states prescribe the procedure which must be strictly observed to give the administrator authority to sell real estate under any circumstances.

It is suggested that the student, as he has opportunity, should make a further study of these very interesting doctrines, as they have an important bearing on the various rights, duties, and liabilities of administrators and executors with respect to their dealings with personal property, on the one hand, and real estate on the other.

THE PHRASE "REDUCE TO POSSESSION" DEFINED.—"Reduce to possession" is a phrase which will quite frequently be used herein. It denotes, in brief, the collection of the debts due the decedent, the withdrawal of deposit accounts and the opening thereof in the name of the administrator, the selling of stocks and bonds or having them registered in the name of the administrator, and so forth; in short, to "reduce the assets of an estate to possession" means to get them into such shape that debts, funeral expenses, administration expenses, taxes, and other charges, can be paid and that, in due course, distribution of the estate can be made.

The assets of the estate having been reduced to possession, it is the administrator's first duty to pay

the debts of the decedent. These debts are usually payable in this order: Administration costs, widow's allowance, funeral expenses, expenses of last illness, secured debts, or claims reduced to judgment during the lifetime of the deceased, and general debts. But the statutes of the several states vary so much that the student must study such statutes and the practice under them in order to familiarize himself with the order of payment of debts in his particular state. It is usually provided by statute that before an administrator can legally pay a claim it must be proved and allowed by the probate court. The claims are properly classified by the court at the time of allowance and must be paid in the order indicated by such classification.

A MINIMUM PERIOD ALLOWED FOR ADMINISTERING AN ESTATE.—In every state a fixed minimum period is allowed the administrator in which to settle an estate, and until that time has expired no creditor or other person interested can compel the administrator to act or to make any payment. The remedies in case of the default of an administrator will be discussed later.

THE ADMINISTRATOR IS RESPONSIBLE FOR FAIR ADJUSTMENT.—If the administrator fails to respect the priority of claims as established by their classification, and by payment of a claim of a low rank exhausts the assets so that claims of a higher rank are not paid, or if he pays the whole of one claim of a particular class when the assets are sufficient to pay only a proportionate

part of all claims of that class, he may be compelled to pay out of his own property the loss sustained by the other creditors on account of such erroneous payment. It is therefore hazardous for an administrator to pay any claims until all claims have been proved and allowed or until the time for filing claims has expired.

Most states have made provision, by law, for allowances to widows or minor children, or both, and, in some instances, for the maintenance of the home for a short period after death. Wherever such provisions have been made, the allowances generally have priority over debts, taxes, and in some cases even over administration costs; and that custom is usual, notwithstanding the fact that the decedent's estate may be insolvent. These allowances are based on the general public policy that widows and minor children should not be allowed to become charges upon the community. In some instances it is the administrator's duty to make payments on account of such allowances, and, in other cases, such allowances are directed to be made by the proper probate court only upon petition duly presented by or in behalf of the widow or minor children.

PAYMENT OF TAXES.—After the administration costs and debts have been paid, the next duty of the administrator is to see to the payment of the various inheritance, transfer, succession, estate, or other similar taxes to which the estate of the decedent or any part thereof may be liable. As there is a chapter to be devoted to the question of such

taxes, that subject will not be discussed here in detail.

It is only after all of the above matters have been duly attended to that the estate has reached a point where the distribution thereof can be considered. This distribution cannot safely or properly be made until the minimum period of time allowed by law has expired, because, just as an administrator cannot be compelled to pay debts or do any other act until such period has elapsed, even so he is not permitted to distribute the estate or any part thereof during such period inasmuch as creditors and other claimants have that time in which to present their claims. In most states, on receiving the permission of the court and on having the heir, or other person entitled to a distributive share of the estate, file a refunding bond conditioned for the repayment of the amount paid, in the event of a deficiency of the remainder, for the payment of debts and taxes, provision is made for a partial distribution before the expiration of the period of probate.

As a rule, in most states, the making of distribution, except after filing an account of the administration of a decedent and the audit and settlement thereof by the probate court that has jurisdiction of the accounts of such administrators, is technically irregular. There are cases, however, in which the facts practically justify the making of a distribution, with the written consent and approval of all the parties in interest and without the formality or expense of filing an account or having the same audited. The

better and safer practice, however, is to file an account and have the same formally audited, as thereby the administrator or other fiduciary is fortified by a record which is public and permanent. In some jurisdictions the distribution is made first and the account thereof and of the administration is filed thereafter.

As the questions of accounting, audits, and distribution affect administrators, trustees, executors, and others acting in a fiduciary capacity, in substantially the same way, these matters will be made the subjects of a separate chapter.

SOME OBLIGATIONS OF ADMINISTRATION.—Pending the time for distribution, there are certain obligations resting upon the administrator regarding the care of the property which comes into his possession. These duties will be outlined. Cash should be deposited in a safe and sound banking institution, in the name of the estate of the decedent. As the administrator is in the nature of a conservator only, he is ordinarily not bound to invest the funds of the estate but only to deposit them. Should he neglect to do so, he may be charged with legal interest. If he speculates with the funds of his decedent and loses, he must bear the loss; but if the speculations prove profitable, he must hand over the profits to the estate. He must dispose of all securities, except possibly those which come within the category of legal investments for fiduciaries. This subject will be discussed more fully later. He should wind up the business of his

decedent as soon as practicable. In fact, in some states, he cannot continue the business even by order of the court.

PROSECUTION OF SUITS.—It is his duty to prosecute to final determination suits brought by the decedent during his lifetime, as well as to defend suits against the decedent, unless they have been abated by decedent's death, or unless they survive in favor of or against the heirs of the decedent rather than the personal representative. It is his duty to institute suits, if necessary, to reduce to his possession personal property of the decedent, wrongfully withheld, or to collect a debt due. If the death of the decedent was caused by the wrong of another, the administrator is given, in some states and under some circumstances, the right to sue for damages for such wrongful death.

It is usually provided by statute that notice must be given, usually by publication for a specified period, of intent to make a final settlement at a specified time. If no one appears to object to the settlement then filed, or if objections have already been filed, then, on the settlement thereof, the estate is declared to be closed and the administrator discharged by court order.

ADMINISTRATION IN CASES OF WILLS AND IN CASES OF INTESTACY COMPARED.—The last will and testament of a testator having been duly probated and letters testamentary having been duly issued to the executor, the rights and duties of the executor with respect (1) to giving

notice to creditors and others, by publication of notice of the grant of letters testamentary; (2) to reducing to possession the personal estate of the testator; (3) to making an inventory and appraisement thereof; (4) to making payment of debts and allowances; (5) to making payment of proper inheritance, succession, and similar taxes; (6) to preparing the estate for distribution—these are all practically the same as the rights and duties of the administrator of the estate of an intestate decedent. The executor must also, as is the case with an administrator, discontinue any business formerly conducted by the testator, unless specifically authorized by the will to continue such business.

The testator may specifically provide, however, that his executor take charge of certain real estate, or he may direct the executor to sell certain real estate and distribute the proceeds. In such event the title to such real estate does not vest in the distributees under the will but in the executor for the purpose directed.

The following is suggested as a basis for a form to be used in gathering helpful data in connection with an estate about to be administered, whether of an intestate or under a will:

ADMINISTRATION OF ESTATES

PRELIMINARY DATA TO BE SECURED

Information to Be Obtained As Soon As Estate Is Put in Care of Administrator, Executor, or Trustee

Name of decedent
Residence or domicile at time of decease
Funeral arrangements to be made

Cemetery lot Location
Witnesses to will
Names : Addresses
:
:
Cash on hand $; where deposited
Safe deposit boxes and keys
Salary due From whom
Bonds
Stocks
Mortgages
Building and loan association stock
Life insurance
$ due estate
$ due others
Accident or indemnity insurance
Furniture
Jewelry
Personal effects, clothing, and the like
Personal notes due others
Personal notes due estate
All debts due or payable Joint obligations
Interest in business or partnership
Interest in other estates
Powers of appointment under wills
Allowance to be made for maintenance of home
Real estate Location
Value Rents Taxes Water rents
Assessment
Fire insurance
Check books
Is income tax paid to date
Are all other taxes paid to date
Parties in interest
Names : Addresses : Interest
:
:
:
:
Names of minors : Ages : Addresses
:
:
:

Counsel named or chosen

NOTE: As full data as possible, including any in addition to the above which might prove valuable to have, should be secured immediately, so that settlement of estate can be proceeded with smoothly and promptly. These sheets should be carefully preserved with the other records of the estate.

The following is suggested as a helpful check list, to be constantly kept before the person looking after the administration of estates and to be retained as a permanent record.

ADMINISTRATION OF ESTATES

PERMANENT DATA FOR RECORD

Check List of Things to Be Done

1. Estate of "Peter Brown," deceased
2. Opened on books
3. Fiduciary capacity
4. Officer in charge
5. Date of death
6. Funeral arrangements
7. Probate of will
8. Grant of letters
9. Entry of security, if any
10. Witnesses to be paid
11. Counsel chosen
12. Advertise grant of letters or notice to creditors
13. First date Period
14. Investment of cash
15. Allowances (a) out of principal
    (b) out of income
16. Bills to be paid
    Funeral
    Doctors' bills
17. Taxes (a) Income taxes, years
    (b) Real estate taxes, years
    (c) Miscellaneous taxes, years
18. After-born or adopted children
19. Rights to be considered

20. Certified copies of will, how many
21. Short certificates needed, how many
22. Cemetery fund set up
23. Gravestone provided for
24. List of beneficiaries and addresses
25. Which are minors or under disabilities
26. Notify all parties in interest
27. File preliminary notice federal estate tax
28. File preliminary notice any other tax, where required
29. Order table of accrued income on securities owned by decedent
30. Personal effects inventoried and appraised
31. Jewelry and valuables specially listed and safely deposited
32. List of all assets
33. Real estate examined, especially as to title, taxes, fire insurance, and repairs
34. Inventory and appraisement
    (a) Prepared
    (b) Filed
35. Tax waivers obtained
    (a) As to personal property, stocks, and so forth
    (b) As to real estate
36. Election of surviving spouse executed, recorded, and filed
37. Widow's exemption or allowance
38. Children's exemption or allowance
39. Account prepared for filing
40. Account filed in on
41. Date of audit or hearing on account
42. Amount to be reserved for possible additional estate, inheritance, or income taxes
43. Petition for distribution prepared
44. Papers and data needed by counsel at audit
45. Account confirmed by probate court
    Nisi, on
    Absolutely, on
46. Copies of adjudication or court order to parties in interest
47. Revaluation of securities and schedule thereof
48. Reserves for costs of transfers
49. Schedule of distribution
50. The transfer of securities to distributees
51. The assignment of mortgages to distributees
52. Trusts under wills set up
53. Return for federal estate tax made up and filed
54. Distribution made

55. Bonds, if any, discharged
56. Commissions collected (a) On principal, rate %
(b) On income, rate %
57. Special items needing consideration
Who shall be consulted when special questions arise

The above is suggestive only. Sheets should be prepared and kept on the desk of the person in charge. As matters are attended to, they should be checked. The above is not intended to be a history of the administration of the estate but is only a check list. It will undoubtedly have to be varied in order to make it applicable to the practice obtaining in the several states.

CHAPTER V

Administration of Trusts under Wills

FOR the purpose of this chapter, it is assumed that the trusts under the will of a decedent have been set up and that the executor has paid over or delivered to the trustee cash or securities in accordance with the terms of the will and the order of the probate court in directing distribution. Such cash and securities are to be held by the trustees in trust for the purposes set forth in the will.

The question of the right of the trustee to receive securities of any particular kind and to make investments will be taken up in a separate chapter dealing with investments.

VARIATIONS POSSIBLE IN TRUST PROVISIONS.—Subject to the limitations outlined in Chapter III, there is practically no end to the variety of trust provisions. Almost any plan may be carried except that which violates public policy, as, for instance, a trust for the spread of the doctrines of anarchy.

Frequently, trusts are created for the benefit of the surviving spouse, for life, then for the children for their lives, and, at their respective deaths, to

their children or issue, with provisions for the payments of shares of principal when the children reach certain ages, with further provisions for payments out of principal, to aid in the education of the children, or to meet some emergency such as illness and the like. In addition, it is quite often provided that the income to the surviving spouse shall cease in whole or in part in the event of remarriage. In the will appearing in Chapter II will be found most of the provisions suggested above.

POWERS CONFERRED ON TRUSTEES.—As trusts may continue, under some circumstances, for quite a long period, it is customary to confer very broad powers upon a trustee, particularly if the estate is a large one and is composed of real estate, stock holdings, bonds, and other securities, which the trustee has a right to take in distribution or hold or invest in. The following is a fair illustration of the character of the powers so conferred upon trustees:

(Form Conferring Powers on Trustees)

I hereby confer upon my trustees, by this my will appointed, the following special powers and authorities, in addition to, but not in any sense in limitation of, the general powers and authorities vested in them by law, all of which are to be exercised by my trustee without any prior application to any court, to wit:

A. To hold and retain, as investments of my estate or of any trust under my will, the stocks, bonds, real estate, and all other securities and property of any kind which may at the time of my decease comprise my estate and which may be delivered to or received by my trustees, for such length of time as my trustees may deem expedient or advantageous, without liability of any kind for or by reason of such holding or retention.

B. To invest, reinvest, and keep invested the capital or principal of my estate or of any trust under my will, in such securities as my trustees may deem prudent, without restriction to so-called legal investments for trustees; and with power and authority to purchase investments and securities, as aforesaid, at a premium and to deduct such premium from income, or to purchase investments and securities, as aforesaid, at a discount and to credit such discount to principal.

C. To make subscriptions for stock and bond privileges and allotments to such extent as my trustees may deem proper, in companies in which my estate or the trust under my will may, from time to time, have an interest; and to surrender or deposit shares of stock and bonds, from time to time belonging to my estate or to any trust under my will, for the purpose of taking part in any plan of leasing, mortgaging, consolidating, exchanging, foreclosing, merging, or reorganizing of any corporation in which my estate or any trust under my will may, from time to time, have an interest, or to deposit such stocks under any lawful voting agreement, and, in their discretion, to pay assessments in connection therewith; also, to exchange shares of stock and bonds, from time to time, belonging to my estate or to any trust under my will, for such other stock or bonds as my trustees may deem most advantageous to my estate or to any trust under my will.

D. To lease, repair, alter, or improve any real estate or other property of which I may die seized or possessed or which may from time to time comprise the capital or principal of my estate or of any trust under my will; and, if necessary, to borrow money and to secure the repayment thereof either by mortgage on said real estate or otherwise; and to sell and dispose of all or any part of the investments, securities, real estate, and property, of which I may die seized or possessed or which may, from time to time, comprise the capital or principal of my estate or of any trust under my will, either at public or private sale, for such prices and on such terms either for cash or on mortgage or on ground rent or on lease or otherwise as to my trustees may seem fit and proper; and to release said mortgage in whole or in part or to release or extinguish said ground rent in whole or in part; and to make, execute, and deliver to the purchasers thereof good and sufficient deeds of conveyance therefor and all assignments, transfers, and other legal instruments either necessary or convenient for passing the title and ownership thereto, free and discharged of all trusts, without liability on the part of such purchasers to see to or in any way to be responsible for the application of the purchase money; and to make and unite in any deeds to partition or square real estate.

E. To treat as principal and not as income, for the purpose of this will or of any trust thereunder, all stock dividends or proceeds of

sales of rights to subscribe for stock issued, with respect to any stock which may, from time to time, be held by my trustees as part of my estate or of any trust under my will.

F. To have full and unlimited authority and discretion to expend, use, and apply, for the benefit of each minor beneficiary, his or her share of income, in such way and in such amounts as my trustees, in the exercise of their sole and uncontrolled judgment, shall determine to be for the best interests of such beneficiary, or to retain and accumulate such portion of said income as my trustees shall determine to be for the best interest of such minor beneficiary.

G. To expend, out of the capital or principal of any trust held for any beneficiary under this will, such sum or sums of money as, in the opinion of my trustees, in the exercise of their sole and uncontrolled judgment, may be proper for the comfort, maintenance, and support of any such beneficiary or the members of his or her immediate family, in the event of illness, accident, loss by fire, or any other case of necessity or emergency, as a result of which any such beneficiary or his or her immediate family may be in need; such payments, however, are to be made only by and with the consent of the beneficiary in whose behalf or on behalf of whose family they are made, if such beneficiary is physically and mentally capable of consenting thereto; otherwise, such payments are to be made in such way and manner and to such person or persons as, to my trustees, in the exercise of their sole and uncontrolled judgment, may seem best. I hereby exonerate my trustees of and from all liability or responsibility for or by reason of any payments of money my trustees may make, out of the capital or principal of any trust, for the purposes above mentioned, or for the application thereof, by the person or persons to whom such payments may be made.

H. To pay, expend, use, and apply the income (notwithstanding any other provisions in this will to the contrary) to which any beneficiary, under this my will, may at any time be entitled, for the maintenance and support of any such beneficiary during such period or periods as such beneficiary, by reason of age, illness, or any other cause whatsoever, shall be incapable of properly receipting for, receiving, or disbursing the income to which he or she may, from time to time, be entitled, without the necessity on the part of my trustees of applying to any court for leave to pay, expend, use, and apply said income as aforesaid, my trustees to be the sole judges of such incapacity, and the receipt of the person or persons to whom such payments may be made, during such incapacity, to constitute a full and complete acquittance and discharge to my trustees. I hereby exonerate my trustees of and from all liability or responsibility for, or by reason of,

such payments of income or the application thereof by the person or persons to whom such payments may be made.

I. To hold and retain the shares of any distributees who may be minors at the time their respective shares of the capital or principal of any trust, under this will, become vested in them absolutely; and to pay, expend, use, and apply the income therefrom, directly and without the intervention of any guardian and without application to any court, for their maintenance, education, and support during their respective minorities, either by the payment of bills presented therefor or by the payment of such income unto the person or persons having the care and oversight of such minors, as my trustees, in their sole and absolute discretion, may deem best; and the payment to and the receipt of such person or persons shall be a good and sufficient discharge to my trustees and shall relieve my trustees from any liability to see to or to be responsible for the application of the moneys so paid to such person or persons; and my trustees shall pay over and deliver unto such distributees their respective shares of capital or principal when and as they shall severally and respectively attain the age of twenty-one years.

J. To have the most full and ample power to deal with any indebtedness of mine which may be outstanding and unpaid at the time of my decease, either by actual payment or by renewal or by negotiating new loans to replace the old, with further full and ample power to pledge any securities constituting part of my estate as collateral to such loan or loans.

K. To negotiate loans, pledging as collateral security therefor any securities which may at any time constitute a part of my estate, for the purpose of paying estate, inheritance, succession, transfer, or any other taxes which may, from time to time, become due and payable with respect to my estate or any part thereof, or for any other purpose or purposes whatsoever which may be deemed necessary and expedient by my trustees.

L. To exercise any and all of the above powers and authorities at any time during the administration of my estate or during the continuance of any trust created by this my will, for any purpose or purposes whatsoever; it being my will that my trustees shall have, at all times and for all purposes, the most full and ample powers in dealing with my estate and with the real estate, stocks, bonds, securities, investments, and all other property of any kind which may at any time constitute my estate or any trust under my will, and that no such powers or authorities shall at any time be deemed to have lapsed or to be exhausted.

RESPECTIVE RIGHTS AND LIABILITIES OF CO-TRUSTEES.—Some trusts are administered by two or more trustees, and this possibility gives rise to a consideration of the question of the respective rights and liabilities of co-trustees. As a general but not universal rule of law, while executors, when there are two or more, may act separately with respect to the property of their decedent, yet the act of one is binding on all, except that, when it is the evident intention of the testator that their powers should be exercised jointly, and when any legal action is necessary, then all co-executors are required to join in bringing suit; as to trustees, it is necessary that all act together, as, for instance, in transfers of securities, in conveying or mortgaging real estate, or in pledging trust property. Bank deposits should be in the name of all the trustees. If, however, it is so arranged that one of such trustees may sign checks on such account, and such trustee should embezzle such funds, then all the trustees would be held liable.

CUSTODY OF CASH AND SECURITIES IN JOINT TRUSTEESHIP.—When an individual is acting jointly with a trust company or bank in administering a trust, the question as to who shall have custody of the cash and securities of the estate frequently arises. This is, of course, a matter of arrangement between the parties. Sometimes such cash and securities are placed in a depository, subject only to joint control; but when a trust company or bank is one of such co-trustees, it is usual

to put all such cash and securities in the control of that organization, unless the statutes of the particular state of jurisdiction or the rules of court do not permit such an arrangement. It is the practice, in many cases, to provide, by the will or instrument creating the trust, that the bank or trust company shall be the sole custodian of the cash and securities of the trust. The following is an example of such a provision:

I will and direct that my corporate trustee shall have the custody and care of the moneys, investments, and securities which may constitute my estate and the capital of the trust created by this my will; and shall keep the accounts of my estate and said trust, provided that my individual trustee shall have access to said securities, investments, and accounts, in conjunction with my corporate trustee, at all times during business hours; but shall not remove said moneys, securities, investments, and accounts from the office and custody of my corporate trustee without its assent.

LACK OF HARMONY AMONG CO-TRUSTEES.—If co-trustees should find it impossible to act in harmony, in the administration of a trust, the usual practice is for one of them to resign; otherwise the beneficiaries may apply to a competent court for relief from such a condition. Fortunately, however, such a situation rarely arises.

THE SPENDTHRIFT CLAUSE.—In those states, such as Pennsylvania, New York, Massachusetts, Missouri, California, and Illinois, which permit such provisions by statute or otherwise, it is customary to insert in wills a clause somewhat as follows:

I will and direct that all the shares of principal and income, by this my will given to or directed to be held for the use and benefit of

the several and respective beneficiaries, in the trust in this my will, mentioned or set out, shall not be in any way or manner subject or liable to their or any of their anticipation, sale, pledge, debts, contracts, engagements, or liabilities; and shall not be subject or liable to attachment or sequestration under any legal or equitable or other process.

This is known as the "spendthrift" clause and is inserted for the benefit of those entitled to receive income from or ultimately to take the principal of the trust under a will. The right to place such limitations on beneficiaries is based on the theory that, when a man may lawfully make a provision for any one under his will, inasmuch as he might have withheld the gift altogether, he may attach to his gift any lawful condition. Whenever such a provision exists and is permitted, a trustee, in paying income to a beneficiary or in making distribution to him, is bound to see to it that such beneficiary himself actually receives the income and gives his own receipt therefor. The trustee is not required to honor any order for such income, even though it is signed by the beneficiary; nor is the trustee required to recognize any assignment of such income. Moreover, except for certain special purposes such as support of the beneficiary's wife and children, the income cannot be collected by creditors of the beneficiary by legal process. The student should acquaint himself with the laws and decisions of his state on this subject.

DISTINCTION BETWEEN LEGAL AND EQUITABLE TITLES.—With the above considerations in mind, it must always be remembered that the legal title to trust property is in the trustee,

whereas the equitable title or beneficial interest is in the beneficiaries of the trust. This being the case, the trustee is in control of the trust property; subject, however, to his being called to account by the beneficiary, if he, at any time, is guilty of maladministration.

DUTIES OF TRUSTEE AS TO CONSERVING AND INVESTING A TRUST.—The primary duty of a trustee is to conserve the trust property and not to deal therewith. Therefore, unless by the will he is given specific authority to do so, or the law so permits, he is not legally authorized to sell the securities or property of the trust except under the express direction of the court having jurisdiction thereover.

Moreover, all trust funds should be kept in a separate deposit account; they should never be mingled with the trustee's own individual funds. If a trustee does mingle trust funds with his own and a loss occurs, he will be held liable; on the other hand, if such action results in a profit, the estate is entitled to such profit. All securities should be so registered as to show the trust. Everything should be done to preserve and protect the trust property and so earmark it as to show the estate to which it belongs.

Another important duty of a trustee is so to administer the trust that the beneficiaries will get the maximum of benefit therefrom, consistent with safety of the principal or *corpus* of the trust. In some states, the courts have gone so far as to say

that if a trustee, fearful of making investments or negligent with respect thereto, fails to invest idle funds, he will be charged with the legal rate of interest thereon.

CAUSES OF REMOVAL OF A TRUSTEE.—Upon petition of the beneficiary, should a trustee prove incompetent or be guilty of wrongdoing, he may be removed and a new trustee appointed. Misuse of funds, improvidence, insolvency of the trustee, and making of grossly improper investments, are causes of removal.

TRUSTEE'S DUTIES AND RESPONSIBILITIES REGARDING REAL ESTATE.—The trustee's duties and responsibilities, with respect to real estate constituting part of the trust principal, are essentially different from those of an executor. In the trustee rests the legal title. He therefore has the undoubted authority to rent the real estate, and he should do so; he should also keep the same in repair and properly insured against loss; in other words, he should so manage the real estate as to preserve it and at the same time make it as productive as is safely possible. His right to sell the same is subject to the authority and direction of the court having jurisdiction thereover, unless the instrument creating the trust gives the trustee specific authority to sell.

LAWS UNDER WHICH TRUSTS OPERATE.—As a general proposition, it may be said that a trust is subject, as to the interpretation thereof and as to questions arising concerning its

administration, to the law of the state of domicile of the person creating the trust. If, however, the trustee is located in another jurisdiction, the law of the state wherein the trust is located will govern as to the administration of such part of the assets of the trust as are personal in their nature. As to real estate, which may constitute a part of the trust assets, the laws of the state, wherein such real estate has its *situs* (location), always govern.

While no one is compelled to accept a trust when he has been appointed trustee, if he does so accept, either specifically or by acts equivalent to an acceptance, he will be subject to all the duties and responsibilities of that office; as is well stated in Perry on Trusts, (S 402):

> Trustees will be held to great strictness in their dealings with the estate, but courts will treat them leniently when they act in good faith. A trustee is bound to exercise ordinary care and judgment, and it is no excuse for him that he did not possess them; by accepting a trust, whether gratuitous or not, he undertakes that he does possess and will exercise them. In the case of Hun v. Cary, 82 N. Y., 71, it is said: When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence; and it is a gross breach of duty—grossa negligentia—not to bestow them.

DELEGATION OF TRUSTEE'S DUTIES.—A trustee is not permitted to delegate his duties to others, as he was appointed to do that particular work. If, however, in the ordinary course of business, it becomes necessary to do some formal thing in connection with the administration of the trust, as, for instance, the collection of rents, preparation of accounts, or similar acts not requiring the exer-

cise of discretion, such as fixing the terms for the sale of a house, he, the trustee, may delegate some one to perform in his behalf such ministerial act.

Another duty of a trustee, almost too obvious to mention, is the payment to the beneficiaries, at appropriate times, of the shares of income or principal to which such beneficiaries may be entitled. In this connection, the wisdom—in fact, the duty—of a trustee, to keep open to the inspection of the parties in interest or their counsel a complete and accurate account of the administration of his trusts, cannot be too strongly emphasized. The subject of accounting by executors, trustees, and other fiduciaries, as has already been said, will be made the subject of a separate chapter.

Other incidental matters, a mixture of duty and good business practice on the part of a trustee, might well be mentioned here. Examples are: Sending statements to beneficiaries when income is paid, sending periodical statements showing the securities or other property held in the trust.

The liabilities of a trustee relate generally to those for loss or damage arising from bad faith or negligence in the administration of a trust. Some of these instances have already been mentioned. The matter of bad or improper investments is another. As the subject of investments is treated in a separate chapter, nothing further relative thereto will be said here. The remedy of the beneficiary is by application to the proper court for correction of the abuses or compensation for the losses.

TERMINATION OF A TRUST.—When a trust is terminated and a proper accounting thereof made, followed by an appropriate distribution to the parties entitled thereto, the trustee will be discharged; that is, relieved of all further duties and responsibilities with respect to the trust property.

In addition to the termination of a trust by the fulfilment thereof, a trust ordinarily may be terminated by the consent of the beneficiaries, if they are all in being, are all of full age, and are all *sui juris* (capable of acting in their own behalf). The exception to this method of terminating a trust occurs when such termination would defeat the very purpose foı which the trust was created. For instance, in the case of a spendthrift trust, to permit such a trust to be terminated by agreement might enable the creditors of the beneficiary to secure the fund, although the very purpose of the trust was to prevent just that thing and to insure the beneficiary against his own improvidence and pure wastefulness.

ACCOUNTING MADE AT DEATH OF TRUSTEE.—On the death of a trustee, whether he is the sole trustee or one of several trustees, the trust is said to terminate so far as his responsibility with respect thereto is concerned, and an accounting of his administration to the date of his death must immediately be made in order that his estate may be relieved. The costs of such accounting usually fall on the beneficiaries. It is this possibility of the death of individual trustees, several of whom, in

succession, might die during the running of a trust, of the attendant expense of accounting, and of the appointment of a successor in the case of the one individual trustee's death, that is a potent factor in urging the appointment—either as sole trustee or as one of a number of trustees—of a corporate fiduciary, which, theoretically, never dies.

It is the law of most states that, whether the succession is provided for in the instrument creating the trust or, on petition, by appointment of the court, the succeeding trustee is clothed with all the rights, powers, and authorities vested in the original trustees. A possible exception to this rule exists when the creator of the trust has delegated to his trustees some peculiar, personal discretion which he might not have delegated to any other persons.

Consideration will now be given to a number of matters affecting trusts in general and administration of trusts in particular.

CONDITIONS UNDER COMMON LAW.—At common law, trusts were not favored, because the common law recognized only the direct ownership of the man in possession of property. If property were left in trust to one to pay the income to another, and if the one refused or neglected to pay such income to the other, no relief was furnished at common law, but the beneficiary was compelled to resort to courts of equity. The reason for this condition was that at common law the person to whom the property was entrusted had

the legal title thereto, which was the only title the common law courts would enforce; they did not recognize that property could be held "in trust." See Conyngton on Wills, Estates, and Trusts.

Originally, trusts were devised for the purpose of circumventing statutes and decisions relative to holding land. The law courts recognized the legality of trusts but refused to look behind the form and to force the trustee to carry out the trust for the benefit of the beneficiary, the *cestui que trust.* Hence, the latter was compelled to appeal to the sovereign as the supreme authority to compel trustees, as a matter of equity, to carry out the intentions of the creator of the trust. These applications were referred by the sovereign to an ecclesiastic called the chancellor. He was the highest judicial functionary and was known as the keeper of the king's conscience.

ORIGIN OF CHANCERY OR EQUITY.—Appeals were likewise made in other cases to which the common law courts afforded no relief. Gradually a system of precedents grew up, chancery or equity practice was established, and, in time, the chancery or equity courts became established as part of our legal system. Probate matters and also the enforcement of trusts were among those responsibilities that were transferred from the church, where the jurisdiction originally rested, to the chancery or equity courts. In some states, the distinction, more or less sharply defined, between law and chancery, is preserved; in others, it has completely disap-

peared. As an example, in New Jersey there are chancellors and vice chancellors and separate equity courts; in Pennsylvania and Illinois the distinction is recognized, but the judges of the common pleas courts, in one case, and of the circuit courts, in the other, sit one day as law judges and the next as chancellors. Some states have abolished the distinction altogether, and all actions are in the same court whether of law or of equity.

TRUSTEES ARE ALWAYS AVAILABLE.—It is recognized that, while a trust may fail because of illegality, it can never fail for want of a trustee. The proper court, on application by interested parties, will appoint a trustee to carry out the trust, just as it will, in case a trustee dies, appoint a successor. The authority of the courts of equity over trustees and their actions seems too well known to require more than a bare reference thereto. Moreover, a trustee, subject to the restrictions imposed by law, may usually apply to the proper courts for directions regarding the terms of the trust if the instrument creating the same is ambiguous, if he desires to resign, or if some question concerning the administration of the trust—for example, the propriety of sale of trust assets—arises.

DOCTRINE OF CY-PRES.—At this juncture it seems well to say a few words regarding the doctrine of *cy-pres* (an old French term meaning "so near" or "as near"). It usually applies to cases of trusts for charitable purposes. When the immediate object of the settlor's bounty fails, the courts

will not permit the trust to fail, but rather than have the property revert to the legatees, devisees, heirs, or next of kin of the settlor, they will direct that it be carried on for a purpose similar, or as nearly so as practicable, to the one designated by such settlor. In order to make unnecessary the petition to court to apply the *cy-pres* doctrine, with its attendant expense, the idea of community trusts—more fully described in Chapter X—was developed. In these trusts a wide discretion is vested in the trustee with respect to the disposition of the income of trusts for general charitable purposes.

REMUNERATION OF THE TRUSTEE.—It is also interesting to note that originally a trustee, by law, could make no profit of any kind out of the trust property, and therefore he could not collect or receive any remuneration for his services, because the position was considered a great honor and the confidence placed in the trustee was considered a sufficient emolument. He was, however, entitled to reimbursement for expenses which he actually incurred. As time went on and trusts increased in number and complexity, it was difficult to secure men of character to serve as trustees without compensation, and the practice of payment of commissions grew up, being covered, at first, by special provisions in the instrument creating the trust and, later, by an enlightened public opinion that found its way into the statute law and the decisions of the courts. Some statutes, merely providing that trustees shall be entitled to receive commissions, are

general; others, as, for instance, the statutes of New York, actually fix the rates. In other states, as, for instance, Pennsylvania, the allowance of commissions has grown up as a practice recognized by the court. In some instances, a flat rate is allowed on both principal or *corpus* and income; in others, a sliding scale of rates prevails. As the rates of commissions vary so much in the individual states, no attempt will be made here to outline them; the student should familiarize himself with the law and the practice obtaining in his particular state.

The trustee's commission and reimbursement for expenses represent the extent of the benefits he may derive from the trust. He cannot charge a commission for loaning funds of the estate unless such commission be credited to the trust. He cannot, directly or indirectly, purchase any of the assets of the estate, except, in some instances, by the express permission of the court having jurisdiction of the trust, even though the trustee pays a full and fair price therefor. Some banks and trust companies maintain bond or investment departments and, in some cases, sell bonds or other investments to the trusts. This practice, however, is not approved generally and may be held to be unlawful, unless the sale is made to the trust at the cost price to the bank or trust company, although the actual price asked is the market or offered figure and although the same price is paid by the trust as would have been paid had the securities been bought from an outside dealer. (The case of White v. Sher-

man, 168 Illinois, 589, illustrates the principle.) In that case the trustee was a member of the board of underwriters and wrote the insurance on the trust property, retaining the commission; the premiums paid were the same as though the insurance had been placed with other agents. The court held that such commissions could not be retained by the trustee but must be credited to the trust, less the cost of the underwriter's membership. The courts are very solicitous that a trustee shall act with the utmost good faith and shall not make his administration of a trust the source of profit to himself. In all transactions with trust property or with the beneficiary, the presumptions are always against the trustee and in favor of the beneficiary. In any contest the burden of proof is on the trustee as to the fairness and propriety of the dealings in question; it is never on the contestants.

GOOD FAITH IS REQUIRED.—Utmost good faith is required of the trustee—*uberrimae fide.* He cannot mix trust funds with his own funds without becoming liable in conversion, and he cannot mix trust funds of one estate with trust funds of another estate, nor speculate with the funds of the estate, nor invest the funds in any securities unless authorized to do so by the court, by the statutes, or by the terms of the will; and at all times he must show the utmost good faith toward his ward or beneficiary.

For example, (1) a fiduciary cannot buy at his own sale, directly or indirectly (Crawford County

Bank v. Baker, 95 Ark. 438); (2) he cannot buy at an execution sale; (3) he cannot buy at a commissioner's sale; (4) he cannot buy at a tax sale; (5) he cannot buy at a public or private sale. An administrator cannot buy at a commissioner's sale, at a tax sale, at a public or private sale without creating a trust. (Williford v. Williford, 102 Ark., 65—"When an administrator or a trustee, without knowledge of his beneficiary, purchases the property entrusted to his charge, either at a private or public sale, equity will impress a constructive trust upon the property so purchased for the benefit of the beneficiaries.")

The only safe rule, therefore, for a fiduciary, acting as administrator, executor, attorney, or agent, is not to buy in the property of his ward, estate, beneficiary, or *cestui que trust* except for the benefit of such ward, estate, beneficiary, or *cestui que trust.*

LIABILITY OF TRUSTEE IS THAT OF OWNER.—As a trustee holds the legal title to and is looked upon as the owner of the trust property, actions at law are brought against a trustee individually, and judgments are rendered against him as an individual. If a trustee holds real estate and some one is injured by defects negligently permitted by the trustee, he is liable individually and his individual property must bear the burden; the same is true of other damages resulting from the negligence of the trustee. Under proper conditions the trustee may reimburse himself from the trust property.

If a trustee enters into an obligation of any kind

and desires to be relieved of all individual responsibility with respect thereto, it must be clearly so stated or be definitely so understood by the other party. It is well, in every undertaking by a trustee, that it be set forth clearly and concisely that such trustee is acting only in his fiduciary capacity and that the trust estate only, or its proceeds, is to be looked to for payment. In connection with the duties and responsibilities of trustees, the student is directed, for a more exhaustive study, to Perry's work on Trusts and Trustees and to August Peabody Loring's résumé of the subject based on his lectures at the Harvard Law School and published under the title of A Trustee's Handbook.

DRY TRUSTS.—Some trusts are known as dry trusts; namely, those in which there are no active duties reposed in the trustee or in which there appears no particular reason for continuing the trust. In such cases, the trust is considered to be what is called an "executed use" or, practically speaking, no trust at all, and the beneficiary takes the property free of the trust. Such an instance arises whenever the sole trustee and the sole beneficiary are one and the same person. In such cases, it has been stated that there is no trust at all because the greater estate swallows the lesser.

The payment of taxes by trustees and other fiduciaries will be considered in a separate chapter specifically dealing with that subject.

RIGHTS OF LIMITED AND ULTIMATE BENEFICIARIES.—It is axiomatic that the life

tenants or limited beneficiaries are entitled to the income from the trust, and that the remaindermen or ultimate beneficiaries are entitled to the principal or *corpus* when the trust terminates; subject, of course, to the right of the settlor to make special provisions for payments of income or principal during the running of the trust, in almost infinite variety. In many cases, such special provisions for payments out of principal are made to care for emergencies which might arise in the lives of life tenants; or to care for the education of some of the beneficiaries; or to make up a fixed sum *per annum* when the income itself is insufficient. Subject to the laws forbidding certain accumulations, provision may be made to accumulate income and at certain intervals to pay it over with the principal to certain beneficiaries.

Frequently the trustee is confronted with the question of what constitutes income and what principal. Often the question is difficult to decide, and the trustee is compelled to apply to the proper court to settle the question. In some cases the beneficiary who feels aggrieved will not consider himself bound by the decision of the trustee but will himself apply to the court for relief.

INCREASE IN CAPITAL VALUE IS CREDITED TO THE PRINCIPAL OF THE TRUST.—All increase in capital value, as, for instance, profits on the sales of real estate or other securities, should be credited to the principal of the trust. The authorities are quite in accord on this subject. (A de-

cision reviewing the main features of this question is the case, In re Gartenlaub, 244 Pac. 348. It is mentioned merely as one of a number of decisions on the subject. The student will easily find others in his own state.)

The matter of extraordinary dividends, whether in stock or cash, gives rise to the most difficulties. There are many statutes and many decisions on this important subject, and the student should consult those of his own state for a more thorough understanding of the subject. In general, it may be laid down as a recognized rule that the principal or *corpus* of the trust must be kept intact as it was on the date of the creation or the setting up of the trust, and, therefore, so much of the dividend, whether in cash or in stock, as is needed to keep the principal intact shall be treated as principal, whereas the balance may be distributed as income. Of course, all ordinary dividends should be treated as income, and this is the rule in the majority of states. In New Jersey, however, it appears to be the duty of the trustee to ascertain if such ordinary dividends are paid from current earnings or from surplus. If paid from surplus, or in part therefrom, the trustee must apportion them between surplus on hand at the time of the creation of the trust and surplus set aside during the trust. The proportion from previous surplus is then credited to principal or *corpus* of the trust and the balance to income. As above intimated, however, it is the extraordinary dividends which give rise to the most controversy. Under the

"early English rule" all extraordinary dividends, whether in stock or cash, went to the *corpus*, not to the income. Under the "later English rule," if accumulated earnings were converted into capital, the *corpus* benefited; if distributed as profits, the income benefited. The "Massachusetts rule" followed the latter, and is briefly as follows: "A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital." (See Minot v. Paine, [1868] 99 Mass. 101, 96 Am. Dec. 705.) This rule is followed by the United States Supreme Court, also by the courts of the states of Connecticut, Georgia, Illinois, Maine, North Carolina, Rhode Island, and West Virginia. The "American rule," opposed to the Massachusetts rule and neutral between the "Pennsylvania rule" and "Kentucky rule," is followed, generally, by the courts of the states of California, Delaware, Kentucky (but see below), Maryland, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania (but see below), South Carolina, Tennessee, Vermont, and Wisconsin. The "Pennsylvania rule" (above outlined) sometimes, in a narrow sense, spoken of as the "American rule," which looks into the time when the earnings were accumulated, is followed by the courts of the states of California, Maryland, Minnesota, New Hampshire, New Jersey, New York, South Carolina, and Wisconsin. The "Kentucky rule" awards all distributions of earnings regardless of when accumulated or whether in stock or cash, to income, whereas all distributions of

capital go to the *corpus* of the estate. To understand more thoroughly the distinction between the practical results of applying the "Kentucky rule" as against the "Pennsylvania rule," and how the cases, under the broad view of the "American rule," fall sometimes under that of Pennsylvania and sometimes under that of Kentucky, the student is urged to study carefully the report of the above case of Gartenlaub v. Union Trust Company, Trustee, and especially the annotation thereto. (The same will be found in 24 A. L. R., p. 1.) (See also article in Harvard Law Review of May 1926, at page 905, and article in the University of Pa. Law Review of April 1926, at page 618.) (On this subject see the notable case wherein Standard Oil stock dividends were concerned, referred to at page 604 of Trust Companies magazine for November 1926.) For income tax purposes, the question may need to be treated differently. (See the chapter on taxation.)

THE QUESTION OF PREMIUMS AND DISCOUNTS ON BONDS.—Another question giving rise to much discussion is that of amortization of premiums on bonds purchased at a premium, and writing up of discount on bonds purchased at a discount and redeemed at par.

Ordinarily, if bonds are purchased at a premium, such premium must be amortized; that is, the difference between cost and par must be taken from the interest so that the *corpus* does not suffer a loss. For example, if a 5% bond having five years to run is purchased at 105, on maturity the trustee

will receive 100 and the *corpus* will suffer a five-point loss if the full coupon rate is paid to the life tenant. To prevent this loss the trustee should pay the life tenant only 4% of the income each year and should credit the other 1% to the *corpus* of the trust, so that at maturity the five-point premium will have been repaid to the principal fund and it will stand unimpaired. This is the majority rule, having been adopted in California, Connecticut, New York, and Wisconsin. The courts of Kentucky and Pennsylvania have held against amortization. Decisions in Massachusetts have been for and against, the latest decision following the Pennsylvania rule. Prior to 1907 New York held that premiums were a capital loss, but the latest decision adopts the majority rule. The better practice now seems to be to provide by the will or other instrument creating the trust, that all premiums shall be charged to income; also that all discounts shall be credited to principal or *corpus*.

CITING A SAFE PRECEDENT.—Prior to the unanimous decision rendered by the Supreme Court of California on February 23, 1926 (In the Matter of the Estate of Gartenlaub, Deceased, 198 Cal. 204; 244 Pac. 348), there was hopeless conflict in avowed theory and established practice of trustees in respect to the accumulation of discount on bonds purchased below par. In the Gartenlaub case this specific question was presented for the first time for judicial determination. In that case the will contained the provision that "the entire net income,

revenue, and profit of every kind arising from said estate in any way whatever" be distributed monthly. The trustee had purchased certain bonds at a discount and had retained the full amount of such discount as a part of the *corpus* of the trust. The life tenant appealed from an order of the Superior Court of San Francisco settling the annual account of the trustee, the sole question being the extent, if any, of the right of such life beneficiary to have such discounts accumulated for her benefit and paid over to her by the trustee. The decision, in part, follows:

> Accretions to a trust fund resulting from the increase in value of the bonds or other securities in which its corpus is invested, due to whatever cause, are to be regarded as part of the corpus of the trust and not as income or revenues or profits to which the life beneficiary is entitled.
>
> Whenever bonds are purchased by the trustee at discount, the amount of such discount remains in the hands of the trustee as an uninvested part of the corpus of the trust estate, and it is the duty of the trustee to make a timely investment of the same in other securities to the interest upon which, as it accrues, the life tenant would be entitled and thus there would be made up to the beneficiary approximately the amount of income which she would have received had the original investment been in bonds at par; and this is all to which, under the express terms of the trust, she would be entitled.

Courts of other states may, of course, hold differently, but the safe procedure for the trustee, in the absence of a contrary holding in his own state, is to follow the decision of the California case.

The whole subject of premiums and discounts has received exhaustive consideration at the hands of Frederick Vierling, vice president of the Mississippi Valley Trust Company, St. Louis, Missouri, now deceased. The student is advised to study

carefully his articles on the subject, appearing in a number of issues of Trust Companies magazine of the past few years and particularly the article published in the St. Louis Law Review, November 1922 (Vol. VIII, No. 1).

A FINAL WORD OF CAUTION.—As a final word of caution to trustees, care must be taken to see that life tenants receive income only, and that principal or *corpus* be preserved for those duly entitled thereto. The responsibility for a correct decision rests finally with the trustee, and for any error in that regard he will be compelled to answer if he is called to account by the aggrieved party or the court. Sometimes the surcharge against the trustee in such cases exceeds his commissions, resulting in a loss to him in what promised to be a reasonable source of remuneration for undertaking the trust. Often an apparently slight error will prove disproportionately costly, so it behooves any one undertaking the administration of a trust to be well equipped, fully informed, and properly advised.

THE GENERAL RULE AS TO COUNSEL FEES.—It is a generally recognized rule that a trustee may employ counsel to advise him and that he may pay such counsel a reasonable fee, subject to the review of the court, such fee being a proper charge against the trust estate; in some instances against income, in others, against principal—depending on circumstances.

DECISION AS TO TIME AND METHOD OF PAYMENTS.—The question as to when pay-

ments of income are to begin and to whom such payments are to be made is generally set forth in the will or other instrument creating the trust. Incidentally, in will cases, the trustee is called upon to determine whether income is to be paid from the time of the death of the testator or from the time the trust is set up—usually at the end of the probate period or approximately from six months to a year from the death of the testator. When there are but few or no legacies, the practice of some fiduciaries is to set up the trust at once and to begin payment of the income to the beneficiaries immediately, subject to the payment out of the fund set up of debts, expenses of administration, taxes, pecuniary legacies, and so forth. When there are a number of legacies or the solvency of the estate is in doubt, the above practice cannot well be followed. The general rule is that when trusts are of definite amounts, the trust fund is in the nature of a legacy, and the trust is not set up until the expiration of the probate period; and, in such case, the beneficiary is not entitled to income until the trust fund earns it. In Pennsylvania the rule seems to be that if the trust is for one to whose support the testator had regularly been contributing, or if the beneficiary is one to whom the testator stands *in loco parentis* (in the place of a parent), in such cases the beneficiary is entitled to interest from the date of the death of the testator, and such interest will usually be allowed at 6% until the time when the trust is actually set up.

RESIDUARY TRUSTS.—As to residuary trusts, *i. e.*, trusts of the entire residuary estate, the rule in Massachusetts, supported by decisions in other states and often followed by trust officers in the absence of decision, is that the life tenant is entitled to the income on the clear residue from the time of death but that such income is not payable until the end of the probate period.

INCOME FROM SECURITIES.—Subject to the general rule stated above, and in some states, income from securities sold in the course of administration, together with the balance of cash derived from the sale of such securities, constitute a part of the principal of the estate; in fact, some few states have so provided by statute. Here is an example: $1,000 to A outright; $10,000 to X Company in trust; income to B for life; remainder to C; remainder of estate (or residuary) in trust to pay income to D for life and, at his death, to pay the *corpus*, or principal, to his children and issue. The estate consists of $2,000 in cash and $60,000 in securities. Debts and administration expenses, taxes, and other charges, total $2,500; securities to the amount of $11,500 must be sold to take care of debts and charges and the pecuniary legacies and pecuniary trust. A receives $1,000 in cash without interest; $10,000 in cash or securities are delivered to the trustee; and B receives the income from the time the trust is set up, except as above noted. D is entitled to the income on the clear residue of $48,500 from the death of the testator, and this amount of

$48,500, plus any other cash from income or premiums on securities sold, comprises the *corpus* or principal of the trust.

Income, when payable, may be paid monthly, quarterly, semi-annually, or annually, if the trustee is so directed. In the absence of specific direction, the trustee pays income at such times as he deems reasonable. Some trust companies follow the practice of making equal periodical payments with payments of accumulated surplus once or twice a year; the equal payments are based on a careful estimate of the income yield of the trust each year. Some payments to life tenants may be annuities and some merely gifts of income.

ANNUITIES.—An annuity, generally speaking, is a payment of a specific sum annually, to a named individual for life or a term of years. A trustee is usually required, in cases of annuities, to set up a trust fund which will be amply sufficient to take care of the annuity payments. This fund ordinarily is required to be set up on a 3% basis; that is to say, in order to take care of an annuity of $1,500 *per annum,* at least $50,000 should be set aside. The complications flowing from this practice, if the fund yields more than 3%, are more obvious than they are solvable. It is more satisfactory to have a testator provide a trust fund of say $30,000 (which, at 5%, will yield $1,500 *per annum*) and provide for the payment of the income therefrom to the beneficiary. In some cases, in which fixed sums are to be paid, it may be pro-

vided by the will that the *corpus* may be called upon to make up the deficiency if the income is not sufficient. If income, generally, is to be paid to the life tenant, such income, being based on rents, interest, and dividends received, will naturally vary from time to time and will also be affected by the increase or decrease of expenses in the nature of fees, taxes, and other payments.

APPORTIONMENT OF ANNUITY USUALLY NOT ALLOWED.—An annuity ceases on the death of the annuitant, and his estate is not usually entitled to an apportionment of the annuity from the date of the last payment to the time of death. In some states, however, such apportionments are allowed; whereas, on the other hand, if the gift is of income generally, the estate of the life tenant is entitled to receive from the trustee the interest accrued on bonds and other interest-bearing securities, to the date of death, and dividends declared but not paid. In some jurisdictions the apportionment of dividends is provided for by statute. Example: A is to receive $900 per year, payable January 1, April 1, July 1, and October 1 of each year. B is to receive the income from a fund payable at like periods. A dies March 25; his estate, except in the cases mentioned above, receives nothing. B dies March 27; his estate receives income on hand and also accrued interest on all bonds and other interest-bearing securities to that date, plus dividends declared but not yet paid. In the former case, the remaindermen receive all the securities

plus income on hand; in the latter, the remaindermen receive only the securities and income thereon arising and accruing after the death of the life tenant.

"Accrued" as used above means "grown" or "added to" or "becoming a present right or demand," as, for example, the interest accrues on the principal. Interest, it is said, runs or accrues from day to day, and therefore the amount which had run from the date of the last payment of interest is said to have accrued to the principal producing such interest.

CHAPTER VI

Guardianships, Committees, Conservators, or Curators

PROBATE courts have jurisdiction not only of decedents' estates but also of those who are not *sui juris,* that is, not capable of acting in their own right. As Story has said, to make a valid contract, a person must, in general, be *sui juris.* Those who are thus classified as not *sui juris* are minors, declared by law to be incapable of managing property, and persons of unsound mind, weak-minded persons, habitual drunkards, spendthrifts, or any one so mentally weak by reason of age or disease as to be, in fact, incapable of caring for his or her property and therefore liable to become the victim of designing persons.

TITLES OF ADMINISTRATORS FOR INCOMPETENTS.—The law provides for the appointment of persons to administer, conserve, or care for these two classes of incompetents; these administrators are variously designated as conservators, guardians, committees, or curators, depending on the law and practice of the state of the incompetent's domicile. The title used does not necessarily indicate the character of the incompetent. In Pennsylvania, for instance, there may be guardians

of minors, also guardians of insane or weak-minded persons; or there may be committees of insane persons. In other states, guardians are appointed only in reference to minors, and the estates of incompetents are therefore usually placed in the hands of a curator, committee, or conservator. In case a committee is appointed, a single individual may so act. For the purpose of this chapter, the term guardian will be used to designate the one chosen or appointed to take care of the property of any incompetent, whether the incompetency arises from minority or lack of mental capacity, unless the particular case requires a more specific designation.

ESTATES AND PERSONS OF MINORS.—The matter of the care of the estates of minors and of their persons will be discussed first.

Under the law of England, following the common law, the age of majority is twenty-one for both sexes. A person is deemed to be of full age on the day before his twenty-first birthday anniversary. This is true in most of our states. Most of the exceptions relate to females, who, by the laws of some states are of full age at eighteen. The various state legislatures are prone to change the age at which females reach the age of majority, and the student should be familiar with the most recent change in his own state. In some states it is provided that minors shall be of the age of majority on marriage. In Texas a minor who has reached the age of nineteen years may apply to the court for a finding as to ability to manage his property, and on an adjudica-

tion or finding by the court granting the petition, the applicant becomes vested with full control of his property.

The need for a guardian for a minor, perhaps more correctly designated an "infant," arises from the fact that the minor cannot legally act for himself with respect to his property. The only contract or agreement a minor may make which is binding and effective is that made for necessities; that is, for his support and maintenance. All other contracts made by minors are, as a general rule, either void—that is, of no binding effect on the minor—or they are voidable—that is, binding upon the minor when he reaches his majority unless specifically or by conduct repudiated or denounced by him on reaching his majority or within a reasonable time thereafter. The question of what constitute necessities depends on the value of the minor's estate and his station in life. All persons dealing with minors are bound to know that they are dealing with persons not of full age; they deal with such minors at their peril even though they believe the minors are of full age. In some cases it has been held that a contract made by a minor can be repudiated by him even though he represented himself to be of full age at the time he entered into the contract. The plea or answer that a person sought to be held liable under a contract is a minor generally is a complete bar to any action arising from transactions with minors except in cases of contracts for necessities.

A trust officer must be very careful in dealing with property which concerns an infant. (In the case of Arkansas Reo Motor Car Co. v. Goodlett, 163 Ark. 35, the Arkansas Supreme Court held that when a girl under age represented that she was of age, bought an automobile, paid part of the money down, and wrecked the car, the girl could recover back all the money paid during her infancy; this rule is contrary to the rule laid down in the case of Petit v. Liston, 97 Oregon 464. In that case the Oregon Supreme Court held that an infant who had bought a motorcycle and had worn it out could not recover back the money paid. This decision followed the rule laid down in Rice v. Butler, 160 N. Y. 578, in which case an infant had bought a bicycle and had worn it out. The Arkansas case follows the Massachusetts case of Pyne v. Wood, 145 Mass. 558, in which an infant bought a bicycle and recovered back his money after wearing the bicycle out. So we have the Oregon Supreme Court agreeing with the New York Supreme Court and the Arkansas Supreme Court agreeing with the Massachusetts Supreme Court.)

The above shows the importance of not dealing with minors except through their guardians duly appointed by the proper probate court. The matter of opening deposit accounts with minors and permitting them to withdraw money therefrom on their own checks or orders is more or less a modern development and is more recognized in practice than considered good in law.

NATURAL GUARDIANS CONTROL PERSON, NOT PROPERTY.—The expression that the parents are the "natural" guardians of their minor children, with the father, in most states, being given the preference, is one often misunderstood. It relates exclusively to control over the persons of the minors, as to their clothing, maintenance, education, and so forth; it never extends to any control over their property. In this latter regard it is declared that minors are the "wards of the court" and their property is always under its supervision and control. The rather spectacular stories dealing with guardians and their wards, whether portrayed in literature or, more recently, on the screen, must be treated as more romantic than true.

In some states, for instance, Pennsylvania or New Jersey, parents are permitted by their wills, to appoint guardians of the persons and the estates of their minor children, either generally or as to such property as may be given to such minors by the will in question, or generally as to all property coming to such minors or both. In some cases the father has first choice; in others, only the surviving parent. These cases are the exceptions and are mentioned here only because it is felt that the student should be aware of the existence of such statutes.

No person is authorized to deal with the property of a minor or to interfere therewith unless he has been duly appointed guardian with respect thereto and, when required by statute or rules of court, has entered adequate security. While par-

ents, as natural guardians so-called, have no authority with respect to any of the property of their minor children, they are nevertheless, in some jurisdictions, given preference by law in the nominations for guardianship.

PETITION FOR GUARDIANSHIP.—The usual practice in such cases is for a petition to be presented to the appropriate probate court by the "next friend" of the minor, who may be his parent or some near relative. This petition sets forth the name of the minor; his place of residence (which, legally, is that of his parents or, if his parents are deceased, where he is being supported and educated); the fact that he has no guardian; and the fact that he has or expects to receive certain property; with a prayer for the appointment of a person suggested as his guardian. Such petition is usually supported by appropriate supporting affidavits as to the fitness of the person suggested, as to the fact that the petitioner is not interested in the property of the ward, and as to the value and extent of the property involved. Either the court, upon presentation of the petition and upon consideration thereof, enters a decree appointing the person suggested or some other person as guardian, or the court defers such appointment until after a hearing or advertisement, as the law and rules of court may prescribe. If the decree of appointment is made and if the security is entered, where directed, the person so appointed becomes the guardian in fact and in law, and thereafter he has full and sole authority to deal

with the property of the minor; subject, however, to being called to account by the court which appointed him. While the court of domicile of the minor has jurisdiction of his person and personal property, the general rule is that, as to real estate, the court of *situs*—that is, the court of the county and state where said real estate is situate—alone has authority to appoint a guardian with respect to the said real estate. There have been cases in which well meaning people have settled, with parents or "next friends," claims for injuries to minors, only to find later that a duly appointed guardian or the minor himself, when he reaches his majority, can recover a second time inasmuch as the person with whom the settlement has been made has not properly accounted for the funds received or has misapplied the same. It behooves every one, therefore, as above stated, who has occasion to deal with the property of a minor, to deal with his guardian only.

THE GUARDIAN IS PRACTICALLY A TRUSTEE.—The guardian, when appointed, may and, in fact, should immediately reduce all property of his ward to possession; that is, bring it all under his control. He is practically and strictly a trustee with respect to such property. He may withdraw deposit accounts, have stocks and bonds registered in his name as guardian, sue for and collect debts due his ward, and the like.

A guardian, as is the case with a trustee, cannot deal with the estate of his ward to his personal

gain, and he must keep the funds of the estate invested in authorized investments. He is a conservator and his dealings with the property of the minor are subject to constant review by the probate court. If the guardian engages in business with the funds of his ward and profits thereby, such profit belongs to the minor; if losses occur, the guardian and his individual estate must make up the loss with interest.

WHEREIN TRUSTEESHIP AND GUARDIANSHIP DIFFER.—A distinction to be kept clearly in mind in considering the rights, duties, and responsibilities of guardians is this: While a guardian is in the nature of a trustee, he is nevertheless dealing with the property belonging to his ward, the minor; whereas, on the other hand, a trustee, strictly so speaking, is dealing with the property of the creator of the trust in which the beneficiary has only an equitable interest or title. In the case of the guardian the title to the property is in the minor, but in the case of a trust the title to the trust property is in the trustee.

SUPPORT OF MINOR IS APART FROM HIS ESTATE.—The estate is the property of the ward and both income and principal, in proper cases, may be used for the benefit of the minor or, in some cases, for the benefit of his family. As it is the duty of a father to support his children, he must support and maintain even a minor son who has an estate of his own, and in such case the guardian, in most jurisdictions, is not permitted to pay over or apply any

of the minor's estate to his minor's maintenance, education, or support. This is not true, ordinarily, of the mother of a minor.

Subject to the duty of the father to support his minor child, the duty of the guardian is to pay over and apply the income of the minor's estate for his maintenance, and this, generally, but not always, without a court order. It is the duty of the guardian to determine what is a proper allowance for the maintenance of his ward, taking into consideration his needs, his station in life, and any other circumstances which would assist in determining an appropriate amount. Moreover, part of the principal of the estate of a minor may be expended in his behalf if a need therefor arises, differentiating a minor's estate, as above indicated, from that of the usual trust in which income only, unless otherwise specially provided, is available for the beneficiary. A simple illustration of the above need might be given; *e. g.*, suppose the estate of a minor is $10,000 which produces, we shall say, an annual net income of $500. This net income might not be adequate to supply a higher or special education for the minor, should he require one, or should it be deemed wise to give him one. It might well be asked whether it would not be more advantageous for the guardian to provide for him this higher education, thus training him better for his life's work, than to restrict his education to that which the mere income will supply, simply to conserve the principal of his estate. In cases of unusual need, as, for example, serious

illness, major operation, and so forth, need for more money than the income will supply may well be used for the minor's benefit. In such cases the probate court, upon application by the guardian by petition setting forth the facts, will usually allow such additional expenditures to be made out of the principal of the estate of the minor. The guardian could, if he were willing to assume such responsibility, make such payments out of principal on his own initiative, depending on the approval of the probate court when he filed his account or on the approval of the minor when he should become of age. The usual practice, however, is to make such extraordinary expenditures only by the authority of the court on an order duly made and entered. As is said in Conyngton's work on Wills, Estates, and Trusts (1921 Ed., p. 444), ". . . . To expend principal in preparation for life is considered by the courts as being really a form of investment and as merely changing the capital into another and probably more desirable shape."

The rules governing trustees and other fiduciaries in the making and changing of investments apply with almost equal force to guardians, and the student is here referred to the chapter on investments for a fuller discussion of the subject. These remarks also apply to the accounts to be kept by guardians and to the distribution to the minor of the estate in the hands of his guardian when he arrives at full age, relative to which see the chapter on Accounting, Audit, and Distribution.

APPOINTMENT OF GUARDIANS FOR INCOMPETENTS.—There is another class of persons, *i. e.*, those who are incompetent, in fact, to manage their property, for whom guardians or committees or conservators or curators, depending on the practice of the different states, may be appointed. This class is, in general, persons of unsound mind (insane persons or lunatics), idiots, weak-minded persons, habitual drunkards, spendthrifts. Persons dealing with such individuals, not always knowing of their incompetency, seem not to be held to the same accountability as are persons dealing with minors. This question, however, is often a very close one, and the decisions on the subject should be carefully analyzed. It is said that an incompetent person is "legally dead" and therefore no binding contract can be entered into with him. If, however, one deals with him in good faith, unaware of the incompetency, one will, in some instances, be protected. No exact rule of law can be laid down to fit facts as in the case of minors. To indicate the difficulties, a person, in an appropriate proceeding in December of any given year, may be found to have been insane for the period beginning January 1 of the prior year, which condition was declared still to exist at the time of the proceeding mentioned, with the exception that during a six months' period from March 1 to September 1 of a year covered by the finding, such person had a lucid interval. Practically every dealing with the incompetent's property during the period men-

tioned, except those dealings which took place during the lucid interval, is void and not binding with respect to the incompetent or his property.

STATE REGULATIONS IN APPOINTMENTS.—The appointment of guardians of estates of incompetents and the practice incident thereto are fully regulated by statute in every state. They are practically the same as in the case of guardians of the estates of minors, although, in some states, the courts having the supervision of minors' estates and control of their persons are not the same as those having the supervision and control of the estates and persons of other incompetents. The administration of estates of incompetents, the care of their property, the payments of income for their maintenance and support, the payments out of principal for special needs, the making of investments, accounting, and distribution, are all, in most respects, similar to those in the case of guardians of minors and need not again be repeated here. It seems well, however, to emphasize the fact that the principal duty of guardians and similar fiduciaries is that of conservation, and that fact should be constantly kept in mind in administering any incompetent's estate. "Conservator" seems the most apt designation to apply to such a fiduciary.

TERMINATION OF RESPONSIBILITIES.—Except as to proper accounting and distribution, the duties of a conservator end when the incompetency ceases. In the case of a minor, this responsibility ends when he arrives at full age; as for other

incompetents, the duties of a conservator end only when the incompetent acquires full mental responsibility or when he dies.

In this review, no attempt has been made to discuss the rights, duties, or responsibilities of guardians or conservators, respecting the persons or their wards as distinguished from their estates. This matter should be specially studied. As a general rule, a corporate fiduciary prefers, in all such cases, to be charged with the care of the estate only of the incompetent. In some instances, however, the responsibility under the law cannot be so limited, and both the incompetent and his property must be cared for and administered.

CHAPTER VII
Investments

ALL persons acting in a fiduciary capacity, using the word "fiduciary" in its broadest sense, are required to keep properly invested the moneys of the estates or trusts in their care. They must not let these funds lie idle.

NECESSITY OF REDUCING PROPERTY TO POSSESSION.—The exception to the above general rule is that of executors whose duty, in general, is to reduce all the property of their decedents to possession. This duty imposes on executors the necessity of turning into cash all property coming to them, so that debts, taxes, and costs of administration may promptly be paid, so that legacies may be paid, and so that the various trusts under the will may be duly set up. As the period of administration runs ordinarily only from six months to a year, very little is lost to the estate by the non-investment of the funds that are in the hands of the executor. Good practice, however, should prompt the executor to keep the funds well deposited and, whenever possible—especially when the executor is also the trustee of trusts provided for by the will—to keep the funds invested, under the order of the probate court.

NECESSITY OF INVESTING FUNDS.—Keeping in mind the above considerations with re-

spect to executors, it may be laid down as an almost universal rule that trustees should, without delay, invest the funds in their hands in investments permitted or prescribed by law, or, if the instrument creating the trust provides for other investments, in investments permitted thereby. Should the trustee fail, within a reasonable time, to invest idle funds as set forth above, he may be charged with interest. The rate of interest so charged will usually be the difference between the rate received from the bank, where said funds are deposited, and the rate which would have accrued had the funds been invested in securities prescribed by law. In some states, the legal rate of interest, less the rate received from the bank where the funds were deposited—if so deposited—will be charged. The question of what constitutes a reasonable time depends largely on circumstances. No hard and fast rule can be laid down. In some states, a period of from six to fifteen months is allowed, whereas in Virginia and West Virginia the rule seems to be that money collected must be invested within thirty days thereafter. Six months appears to be about the average period allowed in which to seek investments before a trustee will be surcharged. The student is urged to familiarize himself on this point with the usage and the law and decisions of his particular state.

IMPORTANCE OF DECIDING ON THE CHARACTER OF AN INVESTMENT.—One of the most important questions to be decided by a trustee relates to the character of the investments to

be made by him. Ordinarily, this question is decided for him, either by the statutes prescribing investments permitted by trustees, or by the creator of the trust whenever he has left specific instructions to his trustees regarding investments. The above condition imposes on the trustee the duty of determining whether, in those cases in which the executor has not converted the property of his decedent into cash, he shall accept distribution under a will in kind, or whether, in cases in which the trust was created otherwise than by will, he shall hold and retain those securities which have come to him. If either the securities, about to be distributed to the trustee by the executor, or those received under a deed, by a trustee, are of the character permitted by law, the trustee may hold and retain them. If they are not of such character, it is generally, in the absence of specific authority to the contrary, his duty to convert them within a reasonable time into legal investments.

In all these circumstances it must ever be remembered that trustees are held to a strict accountability because they are trustees. A curious distinction, however, seems to have grown up. Individuals are not usually held to the same strict accountability as are corporate trustees—banks or trust companies. This custom is based apparently on the theory that such corporate trustees hold themselves out as better equipped and qualified than the ordinary individual; but of this matter more will be said later.

REGULATIONS BY LAW AS TO CLASSES OF INVESTMENTS.—It is not possible to set out here, with any degree of completeness, the various classes of investments that trustees are by law permitted to make. Practically every state has some statute dealing with the subject. The almost universal rule is to permit investments in (1) public securities, such as United States bonds; bonds of a state, community, or other municipal subdivision thereof; or (2) first mortgages on real property. As a rule the mortgage must be secured on real property in the state wherein the trust is to be administered, the title to the property must be clear, and the amount of the mortgage must usually not exceed 66 2/3% of the appraised value of such property.

In some states, a somewhat wider latitude is permitted, and investments, if carefully selected, may be made also in the following classes of securities:

1. Corporate bonds
2. Corporate stocks
3. Second mortgages
4. Securities of other states

Of course it is obvious that the statutes and court decisions of the particular state in which the student is interested should be studied by him so that he may become familiar with their content.

RESPONSIBILITY OF TRUSTEE UNDER AUTHORIZATION.—In some states, trustees invest funds of their trusts at their peril, even in au-

thorized investments unless made under specific order of the court having jurisdiction of their accounts. If, however, a trustee has purchased securities properly authorized, he is held free from liability for loss in the event of the subsequent depreciation in the value of such investments. This immunity does not permit the trustee, after making such investments, to pay no further attention to them. He must exercise the care of an ordinarily prudent business man in watching investments. As the courts have said, he will not be permitted to sit supinely by while investments are falling in value; nor may he expect to be immune from accountability for loss merely because the investment, when made, was permitted or prescribed by statute or by the order of a court of competent jurisdiction.

In some states, it is held that a trustee, subject to the conditions laid down in certain statutes, may continue to hold investments made by the creator of the trust even though the investments are not such as the law sanctions for trustees. Among these states are Massachusetts, Connecticut, New Jersey, Kentucky, Illinois, New Hampshire, and Delaware.

AUTHORITY OF TRUSTEES STRENGTHENED.—The practice is becoming more common among testators and creators of trusts, not only to permit their executors and trustees to hold and retain the investments made by them, but also to authorize the investment of the funds of the estate or trust in other than legal investments or investments authorized by law for trustees. The probable effect

of such clauses is to relieve the trustee from the requirements or restrictions imposed by law. By these clauses the trustee is authorized somewhat as follows:

First, as to holding or retaining investments:

To hold and retain the stocks, bonds, and all other investments, securities, real estate, and property which may at any time comprise the capital or principal of said trust, for any length of time said trustee may deem expedient or advantageous so to do, without liability of any kind by reason of such holding or retention.

Second, as to making investments:

To invest, reinvest, and keep invested the capital or principal of said trust, in such securities as said trustee may deem prudent, without restriction to so-called legal investments for trustees, and with power and authority to purchase investments and securities as aforesaid at a premium and to deduct such premium from income; also, to purchase investments and securities as aforesaid at a discount and to credit such discount to principal.

THE COURTS DEMAND DISCRETION OF THE TRUSTEE.—Even if such powers are conferred, however, the courts have nevertheless held that the trustee must use ordinary care and prudence in holding investments already made or in making new investments. For example, if a trustee, under the above powers, came into possession of common stocks of railroad companies, he would be held liable if a loss resulted from holding them, unless such retention was the exercise of a reasonable discretion. This probability was brought out very clearly in a recent decision in the Gould estate in New York. The trustees attempted to justify the retention, long after it seemed wise, of the stock of a railroad company in the management of which

the decedent was an important factor. Their justification was made on the ground that the decedent had authorized them to hold such stock as long as they deemed best. (This decision was rendered in the case of Gould *et al.* v. Gould *et al.*, decided November 10, 1925, recorded in 213 N. Y. S., page 286.) It will be well worth the student's while to read and study the whole case carefully, as it is quite an extensive résumé of the duties of trustees, and discusses quite fully a number of administrative questions ordinarily arising in the administration of trusts. (The decision of the Supreme Court of Pennsylvania, in Taylor's Estate, 277 Pa. 518 decided in May 1923, throws a great deal of light on the subject.) (In New York, the case of Matter of Hall, 164 N. Y., 196-199; and in Massachusetts, the case of Appeal of Dickinson, 152 Mass. 184-189, both referred to in Conyngton on Wills, Estates, and Trusts, will be found interesting.) It might be well for the student to examine the decisions of the courts of his own state to learn what rule has been established.

MANAGEMENT OF REAL ESTATE.—The question of the management, in a trust, of real estate, either originally received or subsequently acquired, presents some interesting phases. On account of its peculiar character, special attention needs to be given to real estate and the improvements thereon. The first duty of the trustee is to rent the property for the best rent obtainable from a responsible tenant. If the trust is of indefinite dura-

tion, as, for instance, during the lives of the widow and the children of the decedent, a lease for almost any reasonable period may properly be made by the trustee. If, however, the trust is for an uncertain period or a lesser period than several lives, the period of the lease should not be too extended. However, upon application to the court, under a proper set of circumstances, a long term lease may be authorized. If a lease is made for a reasonable period and if a beneficiary dies during that period, the courts have held that such lease is binding upon the remaindermen. Out of the gross rents received, the trustee is entitled to pay not only taxes, water rents, and other public charges, but also the cost of repairs and the cost of keeping the buildings on the property adequately insured against loss by fire and other casualties; for it is the duty of the trustee to preserve the property for the remaindermen and not suffer it to deteriorate or depreciate in value. Some difficulties arise wherever there is a question as to whether a given thing done to a property is a "repair" or an "improvement." If a "repair," it is payable out of income; if an "improvement," it is properly payable out of the principal or *corpus* of the trust. New roofs and replacement of old plumbing with new are examples of repairs, whereas the laying of new roadways and sewers in front of the said property are examples of "improvements." Replacing one system of heating, which had become obsolete and inadequate, by an entirely new system of heating, has been construed by some courts to be

an improvement, chargeable against the *corpus* of the trust, although some courts have declared this replacement to be a repair, chargeable only to the income of the trust. In some states, the rule is used that if the improvement is not likely to continue beyond the life of the life beneficiary, the cost thereof should be borne by him. If the buildings on the real estate are destroyed by fire or other casualty, the proceeds of the insurance are received by the trustee and held by him, in place of the property destroyed, as part of the *corpus* of the trust.

DUTIES OF LIFE TENANTS.—It was laid down as a legal principle at common law that a life tenant of real estate was bound to keep down incumbrances, that is, to pay all charges against such property and to keep it intact for the remainderman, reasonable wear and tear only excepted.

FIDUCIARIES' INTEREST IN RETURNS FROM INVESTMENTS.—In the matter of returns from investments, the question of proper disposition of stock or other extraordinary dividends is a matter of great concern to fiduciaries. This subject has already been treated at some length in Chapter V, and the student is referred thereto. A good rule for all trustees to follow is to keep the principal or *corpus* of the trust intact; in all doubtful cases, to pay charges incident to trust administration out of income; and, in all cases in which doubt arises regarding the applicability of money or property received, to credit the same to principal. If any beneficiary feels that he is aggrieved by any such

action on the part of a trustee, he may always resort to the courts for relief. In some cases when the amounts are considerable and questions are raised by the life beneficiaries of the trust, it would be discretion on the part of a trustee to seek the advice of the proper court in instances such as those above cited.

SOME ADVANTAGES IN CHOOSING CORPORATE FIDUCIARIES.—A brief reference was made in the early part of this chapter to the fact that corporate fiduciaries are held by the courts to a stricter accountability than are individual fiduciaries because the former are incorporated for the special purpose of administering trusts, advertise themselves as specially fitted for such work, and are better equipped therefor than the individual who usually has no special training in financial matters and who was chosen by the decedent or the settlor solely because he was a relative, a friend, or a trusted business associate.

In these days of innumerable issues of bonds of all kinds, of stocks beyond number, and of varying values of real estate the country over, it is a brave trustee indeed who attempts to sail unpiloted the turbulent sea of investment of trust funds; or he is a foolish or shortsighted testator or settlor who imposes on a relative, friend, or business associate, such onerous duties with all their attendant responsibilities. Corporate fiduciaries—banks or trust companies—are or certainly should be well equipped to handle the very business they were incorporated to

handle. As a rule, they have in their trust departments men skilled in finance and investments, they have facilities to review investments constantly, and, in addition, almost all such corporate fiduciaries have statistical files relating to securities of all kinds, accompanied by the many daily reports dealing with such securities, thus having before them at all times the state of the market with respect to all financial matters. Very few individuals, acting alone, are in any degree so equipped. Perhaps no better reason than the above can be given for the selection of a corporate fiduciary, either to act alone or to act in conjunction with an individual fiduciary.

COMPLICATED REQUIREMENTS OF TRUSTEE.—A brief summary of some of the conditions needing consideration in connection with investments will tend further to emphasize the need of a trustee's being well equipped to undertake the administration of a trust.

While the law permits trustees to invest trust funds in certain specified securities, the trustee must nevertheless use discretion in making such investments. Inasmuch as there may be restrictions as to the size of the issues or the interest rate, or as to the ratio between valuation and aggregate debt, not all state and municipal bonds may be really eligible. Furthermore, the bonds should be legal obligations in all respects and should represent a direct obligation payable from the general revenues of the issuer and not from a special fund. As above stated, a trustee must act with great care and due diligence

or from motives such as would prompt a prudent business man to act. As an example, a municipality issues bonds in a state the statutes of which prescribe that the debt must not exceed 5% of the assessed value of the taxable property in the municipality. A trustee who is offered bonds of such a municipality may find that the community is dependent on agriculture, that for several years there have been crop failures and a consequent inability (not unwillingness) to pay taxes, and that such situation has resulted in defaults in past years. Obviously, such bonds would be an improper investment. The general course followed by trustees is to purchase bonds of a public character only when accompanied by an opinion as to legality of the issue of bonds in question.

Similar questions arise regarding bonds of corporations, such as railroads, public utilities, industrial organizations, and the like. Even if the testator or settlor has given great latitude to the trustee by expressly permitting him to invest trust funds in other than strictly "legal investments," the trustee must nevertheless use care and act only after careful consideration of all the facts and conditions incident to any particular security. This preliminary consideration requires special fitness on the part of a trustee and the access to proper data. No trustee is permitted, except at his peril, to speculate with trust funds, no matter how general his powers are. Under some circumstances, selected preferred stocks may be proper investments but must be pur-

chased only with extreme care. Many rules might be laid down to guide trustees, but the limitations of the text will not permit them to be stated here. The student who is interested is referred to the many excellent works on the subject and to the decisions of the courts of his own state for fuller information.

SPECIFIC DIRECTIONS BY CREATOR OF A TRUST LESSENS TRUSTEE'S RESPONSIBILITY.—There are some cases in which the creator of the trust, by express words, directs a trustee either to hold and retain certain stocks, bonds, or other securities, for a definite period or until the termination of the trust, or to invest in specifically designated securities. In such cases, in the event of loss due to depreciation in value or income-earning power of such investments, the trustee is relieved from responsibility. The judgment of the creator of the trust may prove to have been very poor, and the securities in question may begin to depreciate rapidly in value. It would seem that the trustee can do nothing in such cases until the condition becomes desperate. The only remedy available is to apply to the proper court for leave to dispose of the securities in question. This disposition would be accomplished by the court's directing such a modification of the trust instrument as to permit such action by the trustee. Very often the above is true of real estate when a rapidly shifting population so changes a neighborhood that a particular residential section becomes very undesirable, seriously affecting the value of the real estate in such section. Or,

on the other hand, stocks of a manufacturing corporation of today may be a good income-producing investment which in a few years may become almost worthless. In other words, the sound judgment of today may be the height of folly tomorrow; all of which argues the need of constant watchfulness on the part of trustees and the wisdom of periodically reviewing investments, disposing of or changing those of whose value doubt has arisen, reducing holdings in certain cases, increasing them in others, diversifying investments as a matter of good judgment; in short, so keeping the funds of the trust occupied as to produce the maximum of income for the beneficiaries, consistent with preserving the principal or *corpus* intact for an undiminished distribution to the remaindermen, *i. e.,* to those ultimately entitled thereto.

PROTECTING INVESTMENTS IS A DUTY OF THE TRUSTEE.—In addition to making investments wisely and properly, it is also the duty of a trustee to protect them in the event of default of any kind. For instance, if the interest is not paid on a mortgage when due, or if there is any other kind of default, the trustee should take proper legal steps to foreclose such mortgage or otherwise collect the debt represented by such mortgage. If the lessee of real estate fails to pay the rent or otherwise violates the terms of his lease, the trustee is obliged to take proper steps to collect such rent or obtain possession of the leased property, or both; or, if the interest on a bond is in default, it is the

duty of the trustee to take such steps as in his judgment may be requisite to protect the interests of the trust in his care.

Thus, the trustee must be ever watchful; he may not ever safely lie back and take his ease, confident that he has so wisely chosen his investments that nothing can happen.

Several persons, who have made a study of investments, have suggested that certain proportions be maintained regarding securities held for any particular trust. These proportions vary but the following ratio is generally approved, *viz:* 50% to 70% in mortgages and the balance in bonds of various classifications, interest rates, and due dates. However, no set rule can be laid down to be followed blindly. The conditions in each estate must control each case,

CHAPTER VIII
Taxation

ONLY the barest outline of the theory and practice of taxation may be given in the very limited space allowed for the subject in this chapter. Taxes, under whatever category, as that word is used in this work, are public charges levied by public authority. No tax is valid which is not laid for a public purpose. (Citizens S. & L. Association v. Topeka, 20 Wall. [U. S.] 655.) No government can exist without taxes, unless, perchance, the income from the public domain or public operations is sufficient to defray all the expenses of the government.

A tax has been defined as (1) a portion which each subject contributes of his property (to the government) in order to secure the remainder (Blackstone, I-282); (2) a pecuniary burden imposed for the support of the government (U. S. v. R. Co., 17 Wall. [U. S.] 322; 21 Law Ed. 597); (3) the enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government and for all public needs (Opinion of the Justices, 58 Me., 591; Cooley, Tax. 1). Except for certain technical variations, all other definitions of taxation are practically the same.

HISTORICAL POINTS.—The history and de-

velopment of the theory and practice of taxation is coextensive with the history and development of mankind. In the records of the very earliest civilization, as, for instance, in those of Egypt, one may find laws for the laying, levying, and collection of taxes. The origin of death duties, as inheritance taxes are generally termed, may be traced to Egypt, thence to Rome, thence to England, from which country the custom reached us. The first tax in the nature of a death duty was levied by the Federal Government in 1798, and the first of such taxes, called a "collateral inheritance tax," was adopted by the Commonwealth of Pennsylvania in 1826. At present (1927), all the states have such laws, with the exception of the District of Columbia (not, of course, strictly speaking, a state), Alabama, Florida, and Nevada.

THE CHANGING NATURE OF TAX REGULATION.—It may be well at this juncture to mention the fact that so many changes are constantly being made in the federal and state laws respecting taxation, that this book may not be correct in its statements at any particular time, except as to statements of general principles and practices.

The taxes with which executors and administrators and trustees under deeds are chiefly concerned are the death taxes or duties, more particularly termed: estate taxes, succession taxes, or inheritance taxes.

DISTINCTION BETWEEN ESTATE AND INHERITANCE TAXES.—Estate taxes, as levied

by the Federal Government and by some states, and succession taxes are in their general nature similar. They represent a tax or levy on the right to transmit or give away property and are imposed on the transfer of the "interest which ceased by reason of a death," whereas inheritance taxes, strictly speaking, represent "a tax or levy on the right to inherit and are imposed on the interest to which some person (or many) succeed on a death." (See Knowlton v. Moore, 178 U. S. 41; 20 Sup. Ct. 747; 44 Law Ed. 969, see reference in re Frick's Estate, 277 Pa. St. 242, 121 Atl. 35 [1923], later [June 1, 1925] decided by the U. S. Supreme Court in Frick v. Commonwealth of Pennsylvania, 268 U. S. 473; 45 Sup. Ct. 603; 69 Law Ed. 1058.)

The federal estate tax has been held to be an excise tax and not a direct tax, and it is therefore not subject to the provisions of Article 1, Section 9, of the Constitution of the United States, requiring apportionment of taxation among the several states. (See N. Y. Trust Co. v. Eisner, 256 U. S. 345; 41 Sup. Ct. 506.)

VARIATIONS IN REGULATION OF TAXES IN CERTAIN STATES.—The present inheritance tax of the State of New York is an example of a succession tax imposed on the right to transmit or transfer property, whereas the present inheritance tax law of the Commonwealth of Massachusetts is an example of an inheritance tax imposed on the right of the beneficiaries to inherit, although, by a recent amendment

to such law, the tax is computed upon the aggregate value of the bequests. The Pennsylvania Transfer Inheritance Tax Law is a sort of combination of both; it is imposed on the right to transfer the estate and is borne by the beneficiaries in proportion to their respective gifts under the will or deed in question.

The distinction above briefly suggested is very important from the standpoint of the administration of estates and trusts. Estate taxes and succession taxes are chargeable against the estate or trust, in general being taxes laid, at applicable rates, on an interest which ceased at death; whereas inheritance taxes are chargeable against each beneficiary, in proportion to his respective share or interest in the estate or under the will or deed and at the rate applying to his particular case.

CERTAIN EXEMPTIONS IN INHERITANCE TAXATION.—As a general rule, death taxes, of whatever kind, are chargeable only against the net estate passing to beneficiaries, *i. e.*, that remaining after the payment of all deductible debts, property taxes, funeral expenses, and all proper costs of administration. In other words, on the theory that a man must be honest before he will be permitted to be generous, the only property he has the right to transmit is that which remains after all his debts and the costs of administering his estate or trust have been fully paid. Another deduction, of course, is the exemption allowed by the inheritance tax laws of the various states and, as a result of the

recent decision of the United States in the Frick case, above referred to, inheritance taxes paid to other states.

With the above considerations in mind, let us consider more concretely the duty of an administrator or executor with respect to the ascertainment and payment of death duties.

FEDERAL ESTATE TAX.—As the Federal Estate Tax Law now stands (see Part 1, Title III, Sections 300-321 of the Revenue Act of 1926), the estate of a resident decedent is entitled to a flat exemption of $100,000, but it is required that within sixty days after the death of the decedent, or the qualification of the executor or administrator, there be filed, in duplicate, with the proper collector of internal revenue, a preliminary notice, Form 704, setting forth in brief the name of the decedent, date and place of death, residence of decedent, the name and address of the executors and attorneys, and the amount of the estate. A copy of this form should be obtained and studied.

The failure to file such notice within the time limit subjects the one on whom such duty devolves to a fine for such negligence. If the executor, administrator, or trustee does not have the actual or constructive possession of the property of the decedent, then the duty of filing a notice as aforesaid devolves on the person or party who has such possession. For instance, all the securities of a decedent may be in the safekeeping of a trust company or in the care of a person under an agency or attor-

ney account. Because of unavoidable delays or litigation, it may happen that the sixty-day period will elapse before there is found a person qualified as executor or administrator to file the notice mentioned. In such event, the trust company or the person having the actual custody of the securities of the decedent should make up and file such notice. Persons having actual or constructive possession of any property of the decedent at the time of his death are relieved of the duty of filing this preliminary notice only when the executor or administrator has, within the time prescribed, filed a notice including the property in the possession of such person.

PERIOD OF TIME ALLOWED FOR MEETING OBLIGATIONS.—Assuming that a notice, Form 704, has been duly filed—or even if it has not been filed—a period of one year from the date of the death of the decedent is allowed before the tax actually becomes due and payable. In addition, no penalty may be imposed nor may any suit be brought until 180 days after the expiration of said one-year period. It would seem therefore that a period of one year, plus 180 days, after the death of the taxpayer, is allowed for the payment of the tax. This assumption has given rise to a number of questions as to interest, so that the better practice is now recognized to be the payment of the tax within the one-year period. At any appropriate time before the one-year period has expired, a final return, Form 706, should be made up, in duplicate,

and filed with the collector of the district in which the resident taxpayer was domiciled at the date of his death, and the tax determined to be due by such return should be remitted to said collector. If the decedent was a non-resident, the return and the remittance should be made as indicated by the regulations and the instructions printed on the return. The Form 706, entitled, Return for Federal Estate Tax, is quite explicit in its requirements, and only a very brief summary thereof will be indulged in. The student is urged, for a more comprehensive view of the whole matter, to study the provisions of that portion of the Revenue Act dealing with the Estate Tax, the regulations relating to the administration thereof, and also the instructions on the form itself.

At the beginning of the return, after setting forth the name of the decedent and the district in which he died, certain general information is required; as, the residence, date of death, names of heirs, next of kin, devisees, and legatees. Then, certain schedules of the property of the decedent need to be made up. The figures used in this chapter are based on an assumed estate, and, in all instances, round figures will be used. It is assumed that John Doe, the decedent in question, died July 1, 1926.

Schedules of Property

GROSS ESTATE

SCHEDULE A—REAL ESTATE

1800 A Street, New York; assessed value for year of decedent's death, $1,000,000; fair market value at date of decedent's death, $1,500,000; rents accrued to date of death, $5,000; total $1,505,000.

SCHEDULE B—STOCKS AND BONDS

$100,000 ABC Co. first mortgage bonds; fair market value at date of death, $115,000; interest or dividends, $1,100; total $116,100.

SCHEDULE C—MORTGAGES, NOTES, CASH, AND INSURANCE

$10,000 note and mortgage of John Smith dated May 13, 1926 on 1200 C Street, New York, interest at 6% payable annually; fair market value at date of death, $10,000; income or interest accrued to date of death, $80.

$1,000 note of Peter Brown dated January 1, 1926, bearing interest at 6%; fair market value at date of death, $750; income or interest accrued to date of death, $30.

Cash in XYZ Bank & Trust Company, $1,500.

$50,000 life insurance, all payable to decedent's wife.

A total of $62,360, less amount of insurance receivable by beneficiaries, other than the estate, not in excess of $40,000. This sum reduces the taxable total under this Schedule C to $22,360. The taxability of the balance of the insurance over $40,000 is subject, of course, to the findings of the United States Supreme Court in the Frick Case (Lewellyn v. Frick et al., 268 U. S. 238; 69 Law Ed. 934), and to any other decisions of that court on the same subject.

SCHEDULE D-1—JOINTLY OWNED PROPERTY

Premises 1500 F Street, New York, owned jointly (not as tenants-in-common but as joint tenants) with Richard Roe. Fair market value of property at date of decedent's death, $8,000; amount to be included in gross estate, $8,000; rents and other income accrued to date of death, $100; total $8,100.

Premises 1600 G Street, New York, held by decedent and by his wife as tenants by entireties. As the decedent was survived by his wife, the premises in question vested in her absolutely. It is submitted that no interest in said premises passed by the death of the decedent to his wife, and therefore no interest in said premises is included in this return. In this connection, the recent decisions of the board of tax appeals should be consulted. (See Appeal of Root, Docket 2825, Nov. 30, 1926, also Appeal of Dyer et al. Docket 3351, Nov. 30, 1926.) This matter has not yet been definitely passed upon by the United States Supreme Court.

SCHEDULE D-2—OTHER MISCELLANEOUS PROPERTY

Decedent's interest in partnership of Doe & Roe, merchants. Fair market value at date of decedent's death, $100,000; jewelry, clothing, automobile, $1,000; total $101,000.

SCHEDULE E—TRANSFERS

(The instructions relating to this schedule should be carefully studied)
(It will be assumed that the decedent did make a transfer, in contemplation of death, or one intended to take effect in possession or enjoyment at or after death, taxable under the Act of 1926.) Decedent, by deed dated January 1, 1925, transferred $100,000 in securities to the First Trust Company as trustees, for the benefit of his wife for life, with remainder to his children. Fair market value at date of decedent's death, $110,000; fair market value to be included in gross estate, $110,000; rents or other income accrued to date of death, $1,500; total $111,500.

SCHEDULE F—POWERS OF APPOINTMENT

(The instruction relating to this schedule should be carefully studied)
(It will be assumed that the property disposed of by the decedent was not disposed of by him in the exercise of a "general power of appointment" as those words are used in the Revenue Act of 1926.) A note should be put on the assumed return somewhat as follows: (NOTE: Decedent disposed of the property over which he had a power of appointment under the will of his mother, Sarah Doe, but as this power was not a general one within the purview of the act, said property is not included in this return.)

SCHEDULE G—PROPERTY IDENTIFIED AS PREVIOUSLY TAXED

Property identified as received from a donor or prior decedent, which has been duly taxed within five years of the date of death of the present decedent, is not again subject to tax. The government is becoming more liberal in its interpretation of "identified," and the latest regulations as well as the rulings and decisions should be studied. It will be assumed that there was such property and in the return, under this schedule, the name and address and date of death of the former decedent, and description of the property so identified, will be set forth somewhat as follows: Prior decedent, Samuel Doe; date of death, January 1, 1922; residence at time of death, 8 Main Street, Westville; name of executor, Peter Smith, Westville; former return filed with collector at New York.

$50,000, bonds of Gold City, Nevada; value on day of death, $55,000; accrued income, $1,000; demand note of Alexander White, $5,000; accrued interest, $45; total, $56,045.

DEDUCTIONS

SCHEDULE H—FUNERAL AND ADMINISTRATION EXPENSES

Funeral expenses—Fair & Company	$1,000.00
Executor's commissions paid—3% on $1,920,105	57,603.15
Attorney's fee paid	10,000.00
Letters testamentary, advertising, and so forth	1,000.00
Total	$69,603.15

(NOTE: All incidental administration costs and expenses should be set out in detail)

SCHEDULE I—DEBTS OF DECEDENT

Note due Second National Bank, with interest	$5,500.00
Dr. F. J. Smith, professional services	500.00
Samuel J. Moore, carpenter work	150.00
Collector of Internal Revenue, balance of 1925 federal income tax due	1,150.00
Taxes 1926 on 1800 A Street, New York	27,050.00
Miscellaneous debts (to be set out in detail)	600.00
Total	$34,950.00

SCHEDULE J—MORTGAGES, NET LOSSES, AND SUPPORT OF DEPENDENTS

Mortgage on 1800 A Street, New York	$500,000.00
Accrued interest to date of death	2,000.00
Jewelry lost through explosion of safe deposit vault, not covered by insurance	500.00
Support of widow and children of decedent from assets of decedent's estate, permitted by the local law and allowed by decree of court	1,500.00
Total	$504,000.00

SCHEDULE K-1—DEDUCTION OF PROPERTY IDENTIFIED AS PREVIOUSLY TAXED

(See instructions on return) In this case, it will be assumed that the identity of the property set forth in Schedule G can be clearly established and therefore the items set forth in Schedule G above should be repeated here. They total $56,045.

SCHEDULE K-2—CHARITABLE, PUBLIC, AND SIMILAR GIFTS AND BEQUESTS

Public Welfare Association of New York	$10,000.00
First Church, New York	5,000.00
Total	$15,000.00

SCHEDULE L—RECAPITULATION

Schedule A	$1,505,000.00
Schedule B	116,100.00
Schedule C	22,360.00
Schedule D-1	8,100.00
Schedule D-2	101,000.00
Schedule E	111,500.00
Schedule F	none
Schedule G	56,045.00
Total gross estate	$1,920,105.00

DEDUCTIONS

Schedule H		$69,603.15
Schedule I		34,950.00
Schedule J		504,000.00
Schedule K-1		56,045.00
Schedule K-2		15,000.00
Specific exemption		100,000.00
Total deductions		$779,598.15
Total gross estate	$1,920,105.00	
Noted deductions	779,598.15	
Net estate for tax	$1,140,506.85	

SCHEDULE M—DEDUCTIONS—ESTATE OF NON-RESIDENT
(Not applicable to the case illustrated herein)

RATES AND TAX DUE

DATE OF DEATH—JULY 1, 1926

Net Estate Exceeding	Not Exceeding	Amount of Block	Rate% on and after	Amounts of Tax
.....	$ 50,000	$ 50,000.00	1	$ 500.00
$ 50,000	100,000	50,000.00	2	1,000.00
100,000	150,000	50,000.00	3	1,500.00
150,000	200,000	50,000.00	3	1,500.00
200,000	250,000	50,000.00	4	2,000.00
250,000	400,000	150,000.00	4	6,000.00
400,000	450,000	50,000.00	5	2,500.00
450,000	600,000	150,000.00	5	7,500.00
600,000	750,000	150,000.00	6	9,000.00
750,000	800,000	50,000.00	6	3,000.00
800,000	1,000,000	200,000.00	7	14,000.00
1,000,000	1,500,000	140,506.85	8	11,240.55
		$1,140,506.85		

Total estate tax shown by this return.....		$59,740.55
Credit for estate, inheritance, legacy, or succession taxes paid other states..... (see Act of 1926 and regulations)	$60,000.00	
Total credit (allowed) not in excess of 80% of estate tax of $59,740.55		47,792.44
Amount of estate tax payable after subtracting credits		$11,948.11

The return should be supported by affidavit as indicated on the return, and then the return should be sent with a check for the tax shown to be due as above, $11,948.11 (preferably a certified check), to the proper collector of internal revenue as above indicated. Under the terms of the Revenue Act of 1926, as with other similar acts, the executor, administrator, or trustee is personally responsible for

the payment of the tax. Hence, distribution of an estate, without payment of the tax or proper provision therefor, is made by the fiduciary at his peril. As some time will elapse before the return is finally audited and the exact amount of tax due is fully and definitely determined by the revenue department, the common practice, in order to avoid holding up distribution of the entire estate, is for the fiduciary, in addition to making payment of the tax as calculated by him, to set aside a fund sufficient in size in his opinion to meet any additional assessments of taxes and then to make distribution. When the tax is finally determined and any additional tax found to be due is paid, a certificate formally so setting forth will be issued to the fiduciary, and he may then safely make final distribution of any money or property still in his hands. An interesting and comprehensive ruling covering the subject of release of liens as to specific property subject to estate tax was issued by the Internal Revenue Department in November 1926, and it is known and designated as G. C. M. 681 and appears in Internal Revenue Bulletin for November 8, 1926 (V—45—2964).

GENERAL PRINCIPLES RELATING TO INHERITANCE TAXATION.—In addition to the federal estate tax, if any is due, the fiduciary must also duly plan to have assessed and to pay the inheritance or death taxes due to the state of domicile of the decedent and due to other states and countries. Before proceeding to outline further the practice regarding these various taxes, it seems well to

consider a few general principles relating to inheritance taxation.

Inheritance taxes are not property taxes but are levied only on the right to transfer property; they are measured, however, by the value of the property passing, as that value is fixed or determined by an appraisement. Speaking in a broad way, the states tax transfers as follows:

1. The domiciliary state taxes all the property of a decedent in such state, including all real estate and personal property situate therein, and all intangible personal property wherever the same may be located. The right to tax the latter is based on the legal maxim: *Mobilia personam sequuntur, immobilia situm;* that is, all movable things follow the person of the owner and are presumed to be located where he is, whereas immovable things, *i. e.*, real estate, follow their *situs* or locality.

2. All states tax the real estate of non-residents situate therein.

3. All states tax the personal property of non-residents actually or constructively located in the state. This taxation in a measure runs counter to the legal maxim above stated, but, even though it has so often had the effect of producing a condition approximating double or multiple taxation, it has been generally recognized by the courts in the various states. This whole question of the right of states to tax transfers of property of non-residents is so complex, and there are so many fine distinctions drawn by the courts that no attempt

will be made to discuss it within the limits of this text. The student is referred to the many good and comprehensive textbooks and tax services which deal specifically with the subject.

MULTIPLE TAXATION.—As to multiple taxation, the United States Supreme Court has said:

"No doubt it would be a great advantage to the country and to the individual states if principles of taxation would be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far." (See Hawley v. Malden, 232, U. S. 1; 34 Sup. Ct. 201, 58 Law Ed. . . .) (As to rights of a state to tax a resident decedent's property located in another state, see Frick Estate, 268 U. S. 473; 45 Sup. Ct. 603, 69 Law Ed. 1058.) The above remarks of course do not apply to those states and places—in 1927, Florida, Alabama, Nevada, and the District of Columbia—which have abolished all inheritance taxes. A number of states, which number is constantly increasing, either by express statute or by statutory reciprocity provisions, do not tax personal property or interests therein of non-residents in their borders. Since the writing of this book, however, several vital changes in the law may have taken place, and the student should acquaint himself therewith.

Rates of taxation, classifications of beneficiaries, exemptions to the various classes separately or as a whole, methods of valuation, treatment of

jointly owned property for taxation purposes, valuations of life estates and annuities, valuations of remainder interests, methods of payment of taxes, and a multitude of other details are so varied that it would be almost futile to use the inheritance tax practice of any one state as a typical example. The taxing authorities of the several states are prepared to furnish comprehensive forms of returns or statements many of which have very complete instructions. These forms and several available inheritance tax services, such as those of the Corporation Trust Company of New York, Prentice-Hall, and Commerce Clearing House, will furnish the student with a comprehensive view of the laws and practice of his state with regard to the applicability of the inheritance tax laws thereof to estates both of resident and non-resident decedents.

GENERAL CONCLUSIONS AS TO SPECIFIC PROPERTIES.—With respect to specific kinds of properties, these few general conclusions are almost universally applicable:

Real estate is taxable only in the state where it is situate. Ordinarily, if such real estate is mortgaged, only the value of the equity of the owner is taxed.

Mortgages are taxed usually only in that state wherein the owner of the mortgage has his domicile; but this rule does not apply in Massachusetts, Michigan, or Maryland and possibly not in some other states.

Shares in trust associations holding real estate

are taxed as real estate in the state of the *situs* of such real estate.

Tangible personal property, such as goods, wares, and merchandise, notwithstanding the legal maxim of *mobilia personam sequuntur* above-mentioned, are usually taxable in the state wherein they are located and nowhere else. (See the Frick decision last above cited.)

Intangible personal property, such as money, deposits in bank, shares of stock, bonds, notes, credits or evidences of interest in property, evidences of debts, or rights of action are, in accordance with the principles of the maxim mentioned, subjected to inheritance taxes in the state of the domicile of the decedent.

Life insurance, which is in favor of another and which does not become payable to the executors or administrators of the decedent's estate, is almost universally held not to be part of the estate and is not subjected to inheritance taxes. In this connection, due regard must of course be had to the special provision of the present Federal Estate Tax Law, relating to life insurance in excess of $40,000 payable to individual beneficiaries, and to the decision of the United States Supreme Court in the Frick case (as reported in 268 U. S. 238, 69 Law Ed. 934, above cited). Both the dower of a widow and the curtesy of a surviving husband are taxed if the inheritance tax laws so provide. In some states the community property law prevails. In those states, usually the half only of the community property which passes

to the survivor of the husband or wife is generally held taxable. The laws of the states in which the community property law prevails should be studied especially from an inheritance tax standpoint.

PROPERTY HELD JOINTLY OR AS TENANTS BY ENTIRETIES.—Jointly held property, especially real estate, may be held (1) as tenants in common, when the survivor does not take the interest of the decedent; or (2) as joint tenants, when the survivor takes the whole; or (3) as tenants by entireties, which, for practically all purposes, is a joint tenancy, as between husband and wife. In some states, as, for instance, in Pennsylvania, tenancy by the entirety in both real and personal property is recognized by law. Unless the inheritance tax laws so provide, the usual rule is not to tax the survivors of two or more joint tenants or the survivor of a tenancy by the entirety. In such cases, also, the inheritance tax laws of each state should be studied. New York, Illinois, and California are states which, subject to certain exceptions, as the law now stands, tax the survivor of two or more joint tenants.

TRANSFERS BY DECEDENT IN HIS LIFETIME.—Practically all the states, as well as the Federal Government, tax gifts made by a decedent in his lifetime when such gifts are made without adequate consideration and in contemplation of death, or when they are to take effect in possession or enjoyment at or after death. If the donor reserves some interest in the property, his gift is

usually held to be a gift to take effect in possession or enjoyment at or after death. In some states, a period prior to death is—or is attempted to be—fixed, within which if a gift is made it will be held *prima facie* to have been made in contemplation of death. Such statutes have been considered in a number of decisions by the courts of the several states and by the United States Supreme Court. The case of Schlesinger *et al.* v. State of Wisconsin *et al.*, decided March 1, 1926, by the Supreme Court of the United States (see 46 Sup. Ct. 206; 270 U. S. 230; 70 Law Ed. 557), held such a statute of Wisconsin invalid as an arbitrary classification violative of the Fourteenth Amendment. Each case needs to be separately considered in the light of the law and decisions, and no general rule may be here laid down.

PROPERTY PASSING UNDER POWER OF APPOINTMENT.—Frequently a decedent will give income of a trust fund to a son or daughter for life and then give to such beneficiary the power, by his or her will, to dispose of the principal of the trust, either generally, to any person or persons, or specially, to and among the members of a class. The former of such powers is usually designated a "general power of appointment" and the latter a "special power of appointment." The inheritance tax laws of the several states vary greatly, and no general rule may be here enunciated. It may be said, however, that the usual rule is that when property passes under a "general power" it is taxed as a

part of the estate of the donee of the power (the person to whom the power was given); whereas the contrary rule prevails when the property passes under a "special power." The provisions of the tax laws of each state must be considered with respect to any particular estate under consideration. It must be kept in mind that the power to tax is the power to destroy and that the courts have almost uniformly held that a taxing statute shall be construed most strongly against the government imposing the tax and in favor of the taxpayer. The courts have said that they will allow no more nor any other tax to be levied or collected than the legislature clearly intended.

PRIMARY DUTY OF PAYMENT RESTS ON FIDUCIARY.—With the above considerations in mind, it is the duty of the executor, administrator, or trustee to take proper steps to have all taxable property duly valued or appraised by the proper taxing authorities, not only of the state of the domicile of the decedent, but also of all other states in which taxable property is located; and it is then his duty to pay the tax duly assessed or levied with respect thereto. These duties involve preparation of the various statements or returns required by the taxing authorities, which are as varied as are the tax laws of the several states. The method in vogue in no one state may be said to be typical. As the primary duty of the payment of the tax rests upon the fiduciary, he also has the responsibility of deciding when appeals should be taken against improper

valuations, assessments, or other actions injurious to the estate taxed. The fiduciary should also see that the taxes are ascertained and paid in due time so as to avoid penalties imposed for delay in making returns or payments. He should also see that proper allowance is asked for deductions from the total estate in finally ascertaining the net taxable estate. These deductions are usually: (1) funeral and burial expenses; (2) allowances to family (wherever permitted by law or practice); (3) taxes due at time of death; (4) administration expenses; (5) expenses of necessary litigation; (6) claims against the estate; and, as above stated, (7) since the decision of the United States Supreme Court above-mentioned (Frick Estate, 268 U. S. 473, 69 Law Ed. 1058), taxes paid to other states. In some states (Illinois) the federal estate tax paid may be deducted; in others, such as Pennsylvania or New York, it may not.

DISTINCTION BETWEEN INHERITANCE TAXES ON LIMITED INTERESTS AND ON ENTIRE ESTATE.—Due consideration must be given, depending on the variations in the taxing statutes of the several states, to the payment of the inheritance taxes on life estates, on annuities, or on other limited interests, as distinguished from payment of such taxes on the entire estate, including such interests. In some states, *e. g.*, Pennsylvania, the tax may be paid on the life estate only, and then when the life estate is ended, on the remainder interest at its then appraised value; or the whole tax may be paid on the entire interest at its value as of

the date of death of decedent. Theoretically the state gets the same amount either way. The tax paid on the value of the life estate, plus the interest assumed to be earned, plus the tax on the remainder when the life estate ends, theoretically should be the same as the tax paid on the entire interest plus the assumed earning to the date of the death of the life tenant. If the tax is paid by the executor, trustee, or other fiduciary, on a life estate, reimbursement must be made to the fiduciary out of the income, and in such case no income would be available to the life tenant until the income earned equalled the tax paid for him. In such cases, if the life tenant should die before the income earned on the property held in trust for him equalled the tax paid, it is evident that difficulties are bound to arise and that the fiduciary might find it necessary to pocket the loss as he could not properly reimburse himself out of the principal of the trust. Of course, if the life tenant himself pays the tax on his life estate, no such questions would arise.

In some states, the life tenant must pay his own tax or suffer judgment to be entered against him therefor. This requirement produces hardships. The practice is growing of introducing into wills and trust deeds clauses authorizing and directing the executor or trustee, as the case may be, to pay all estate, inheritance, and similar taxes, out of the residue. The desired result is that all legacies, life estates, and annuities shall be paid over free of such tax. If care is not used, an unduly heavy burden

may be placed on the remaindermen. They may find themselves liable for a greater tax than their interest in the estate amounts to. In this connection, the decision of the Supreme Court of Pennsylvania, in the Frick case in 1923 (see 277 Pa. 242—121 Atl. 35), refers to the language of Mr. Frick's will which provided that "all inheritance, legacy, succession, or similar duties or taxes, which shall become payable in respect to any property or interest passing under my will . . . shall be paid out of the capital of my residuary estate." Although the residuary estate amounted to about $25,000,000, the total taxes paid were about $9,500,000, or over one-third of the residuary estate.

OTHER TAXES.—In addition to the estate tax due the United States and the various inheritance taxes due the state of domicile and the other states in which the decedent had taxable property —all of which need to be paid before distribution may be made to beneficiaries or before title will vest in them clear of such liability—there are other taxes which need to be paid by the fiduciary.

All unpaid taxes due on the real estate owned by the decedent, both for past years and for the current year of death, if they have been assessed and if they constitute a lien thereon at the time of death, are generally considered debts of the estate and payable out of the principal thereof.

Personal property or general property taxes on personal property are generally in the same category as real estate taxes.

Miscellaneous taxes, such as mercantile or license taxes, levied on the decedent, should be paid just as are real estate taxes.

Unpaid instalments of federal income taxes are also payable as above.

Moreover, there are certain taxes becoming payable during the administration of the estate or trust which must be taken cognizance of.

In cases of the administration of a decedent's estate, a return or returns, showing the federal income taxes and state income taxes, must usually be filed for the period from the end of the preceding taxable year up to the date of death of the decedent, and a further return should be filed for the fractional parts of the taxable years succeeding the death of the decedent and up to the period of distribution, subject to distributions of income to beneficiaries and subject to the provisions of the various income tax laws. As this is a matter too complex to be treated here at length, the student is referred to the special tax services more fully explaining the whole situation.

As real estate is said to vest immediately on the death of a decedent, all taxes assessed after the year of the decedent's death are payable by those in whom said real estate vests, whether they be trustees or individuals.

Personal property taxes of all kinds and miscellaneous taxes, assessed after the date of death and prior to distribution, are payable by the fiduciary, usually out of the income of the estate.

CORPORATE FIDUCIARIES RENDER PROMPT SERVICE IN SETTLEMENT OF TAXES.—When it is realized that, until all the various inheritance taxes are fully paid and proper waivers, receipts or acquittances, or consents to transfer, are received from the proper taxing authorities, distribution cannot be made properly—especially as to transfers of stocks, registered bonds, and the like—the importance of such payments becomes most apparent. It is this detail of administration, possibly more than any other, which prompts the appointment of corporate fiduciaries as executors and trustees, for such corporations are perhaps better equipped than is any individual or group of individuals to handle properly and expeditiously all the details incident to ascertainment and payment of inheritance and similar taxes.

INJUSTICES AND REMEDIES IN VARIOUS STATE REGULATIONS.—An examination and study of the inheritance tax laws of the several states will show how glaring the burdens and injustices sometimes are. This phase of law has been made, throughout the country, the subject of magazine articles, which are gradually having their effect. At this writing, Pennsylvania, New York, New Jersey, Massachusetts, and several others, in an effort toward reciprocity by statute or by express provision of statute, are refraining from taxing intangibles of non-residents. A number of states do not attempt to tax non-residents except as to real estate situate within their borders. Another group

of states—Florida, Alabama, and Nevada, and including the District of Columbia, as above stated—have no inheritance tax laws at all. Some states use the so-called "Mathews" or "flat rate plan" whereby a tax of 2% or thereabouts, on the appraised value of intangibles of a non-resident, is imposed in lieu of all other taxes. By reason of the above, many of the hardships incident to the ascertainment and payment of inheritance taxes due to other states, including, in many instances, a payment of a greater sum for expenses and attorneys' fees than for the tax itself, have been eliminated; but there is still room for improvement. There is the need not only to make more easy and less expensive the administration and distribution of estates, but also to reduce the time required for such administration and distribution.

CHAPTER IX

Accounting, Audit, and Distribution—Commissions and Counsel Fees

THE duty of all fiduciaries to render an account of their administration of the trusts confided to their care is axiomatic. All those entrusted with property must render an account of their stewardship. While no particular system of accounting needs to be followed, and although no absolute rules can be laid down regarding the keeping of accounts, there are nevertheless certain basic principles which should be followed, and which will be discussed in this chapter.

THE ESSENCE OF FIDUCIARY ACCOUNTING.—With regard to accounting by fiduciaries, the observations of Sprague, in his Philosophy of Accounts, quoted in Conyngton on Wills, Estates, and Trusts, are quite appropriate. It is stated that in this regard, fiduciary accounting stands alone in that the ". . . . idea of proprietorship is nearly or entirely absent, and its place is taken by responsibility or accountability. It always arises from delegated authority, the affairs being placed under the control of some person or representative of the actual owner whose object in keeping accounts is to prove that he has faithfully administered them . . . The essence of fiduciary

accounting is ascertaining to what extent the person holding these delegated powers has fulfilled his duties and to what extent he is still accountable. He is *charged* with all property coming under his control, and he is *discharged* by any lawful disposal of it for the good of the estate" or, it may be added, by any lawful distribution to the persons lawfully entitled thereto.

ACCOUNTING A NECESSITY IN MODERN CONDITIONS.—The need is becoming increasingly great, from year to year, of keeping not merely accurate accounts but accounts which truly reflect the administration of the estate or trust in all its intricate details. Until comparatively recently, trust accounting was quite a simple matter, and country store accounting methods often sufficed. Today, however, with all the complex kinds of property, which become subjects of trusts, with the intricate questions of taxation, and with the records required to be kept in connection therewith, it becomes almost imperative that fiduciaries shall be skilled in modern accounting methods, although too many of them are chosen without due regard to this qualification. The need for such knowledge might be here cited as another reason why a corporate fiduciary, created and equipped especially for this purpose, should be chosen to act as a fiduciary, either alone or in conjunction with an individual.

INVENTORY IS THE FIRST PRINCIPLE OF ESTATE ACCOUNTING.—The first principle of estate accounting, almost universally recognized

as essential, is that of setting out at the inception of the administration of an estate or trust a full and complete statement of the property, real, personal, and mixed, constituting such estate or trust. This statement is usually called the inventory. The practice regarding values to be placed upon the items set forth in such inventory is not uniform. In some states, market values at the time of making the inventory are used; in others, the par or assessed values. In any event, the inventory is usually the beginning point of a formal accounting to the surrogate or probate court; and more will be said later regarding this principle.

INCOME AND PRINCIPAL MUST BE KEPT IN SEPARATE ACCOUNTS.—Another basic rule is that of keeping principal and income separated in the books of account. While this at one time may not have been absolutely essential, except whenever trusts were created or whenever different persons were entitled to take the principal, today, chiefly on account of the taxes which need to be paid on the income of the estate or trust, this separation of income and principal, in all cases, is imperative. Such separation is also essential when dower or curtesy rights are involved. As to the income tax, the practice is becoming more and more established of keeping income tax accounts on sheets whereon the various items of income—such as liberty loan interest, dividends, interest on corporate bonds (tax-free and taxable interest separated), rents and royalties, dividends on stocks of

foreign corporations, interest on notes and mortgages, non-returnable items—are all listed in separate columns, as are also the deductions allowable. Such deductions include repairs to real estate, interest on mortgages or ground rents, taxes, insurance, water rents and other expenses, interest paid on indebtedness other than that secured on real estate, taxes other than those on real estate, commissions and other legal expenses, commissions to co-trustees, non-deductible items, income paid to or for the account of beneficiaries To this account should be appended the names, addresses, and shares of the beneficiaries and an annual or periodical summarization of the whole, in such a way as to make it the basis of whatever income tax returns should be filed by the fiduciary. In order that proper records may be kept for income tax purposes, similar records should be kept regarding sales of property in the principal accounts, showing the gain or loss resulting from any such transactions.

DETAILED ACCOUNT OF ASSETS OF ESTATE MUST BE KEPT.—Another essential of accounting is that all assets of the estate or trust coming into the hands of the fiduciary must be finally accounted for, in all their details, and therefore the records of the fiduciary must be kept accordingly.

With the above brief observations, it seems appropriate here to outline, in a very general and brief way, the kind of books or accounts to be kept by fiduciaries. These accounts may be in bound

volumes or on loose leaves or, as is now becoming more frequent, on cards kept in boxes of suitable size.

OUTLINE OF PRINCIPAL LEDGER ACCOUNT.—The principal ledger is used to record transactions affecting the principal of the estate or trust, as distinguished from transactions affecting income. This account begins on the credit side, if kept on a double entry basis, with the items set forth in the inventory and appraisement as constituting the original capital or principal of the trust. If it is desired to particularize, separate columns may be used for transactions in investments, in cash, and in the principal in general. While no system may be here outlined as the most acceptable, because many different systems have been devised all of which are very commendable, the following is suggested:

PRINCIPAL AND INVESTMENT ACCOUNT

Sheet No.

	Items		Investments			Cash	Principal		
Date	Dr.	Cr.	Dr.	Cr.	Bal.	Balance	Bal.	Dr.	Cr.

All further transactions affecting the principal of the estate, whether concerning the acquisition of additional or after-acquired property or sales of investments, or otherwise, should be set forth in this account. It is usually accompanied by a separate investment register or record in which the details of the investments are more particularly set forth.

The forms of investment registers or records are so varied and so numerous that the student must be referred to any one of a number thereof which will be found available, no doubt, upon application to any corporate fiduciary in his immediate neighborhood.

INCOME LEDGER ACCOUNT.—Another type—book or sheets or cards—in general use is that known as an income ledger, in which are set forth the transactions relating particularly to items of income. The forms of these ledgers also vary greatly. The following is outlined only as a suggestion:

INCOME ACCOUNT

Sheet No.

Date	Paid	Received	Detail	Paid	Received	Old Bal.	New Bal.

All income received and all income disbursed or all payments, such as commissions, taxes, and fees, are shown in this account and in such detail as may seem wise.

CONTROL LEDGER.—In addition to the above, some form of cash book, book of original entry, or control ledger is usually kept in order that it may be possible to check at all times the actual state of the account—both principal and income.

DISTRIBUTION ACCOUNT.—The principal ledger may also be used to show distributions made

to beneficiaries, although, in some instances, this item is shown in a separate account to conform with the almost universal rule of the probate courts that the account of the administration of the estate or trust be kept and shown, separate and distinct from the distribution of any part thereof.

When the size and complexity of the estate or trust warrant it, supplemental accounts, such as rent registers, notes payable registers, interest blocks, and tax registers, are kept.

As the limitations of this text will not permit a further particularization here, in connection with the above, the student is referred for further information to the special textbooks dealing with the subject of accounting, especially with fiduciary accounts. (See references in Clay Herrick's book on Trust Departments in Banks and Trust Companies, [1925] pages 54 and 55.)

SUMMARY OF NECESSARY ITEMS IN TRUST ACCOUNTING.—Duplication of effort should of course be minimized, but the absolutely essential elements of a system of trust accounting adopted by a fiduciary are those which will yield the following information with respect to each account accurately and promptly: The amount of the principal, the amount of investments in both real and personal property, the amount of income on hand, the amount of uninvested principal, and a specific list of investments and real estate. The system must also provide for the timely collection of rents, dividends, and interest, as well as maturing investments, and

for the timely payment of taxes, interest, and other obligations and for prompt distribution to beneficiaries when due.

VARIATIONS IN VERIFYING AND FILING ACCOUNTS.—When the time has arrived for the presentation of an account to the proper probate court, as, for instance, when the period allowed for administration of a decedent's estate has elapsed or when a trust has ended or when, for some other reason, an account needs to be filed, it is the duty of the fiduciary to state and duly file his account, usually verified under oath. The particular form of such account and its divisions vary in some details in practically every jurisdiction, and therefore the student must familiarize himself with the law and practice obtaining in his own state.

As a general rule, accounts are divided into Personal Estate—Principal, debit and credit; Personal Estate—Income, debit and credit; Real Estate—Principal, debit and credit; Real Estate—Income, debit and credit; and Distribution items. Accounts of executors and administrators usually begin, as to Personal Estate—Principal, by debiting that account with the amount of the inventory and appraisement; and as to Real Estate—Principal, in cases in which they are authorized to deal therewith, by debiting that account with the real estate of which the decedent died possessed. The income accounts, properly separated as to income from personal property and income from real estate, usually set forth only actual in-

come received and actual payments therefrom. The distribution accounts show disbursements made to beneficiaries. In the case of trustees and similar fiduciaries, the principal accounts usually start off with the amounts, whether cash, securities, real estate, or other property, actually awarded to and received by such fiduciaries. Guardians, conservators, and the like, are, in this respect, in the class with trustees.

CREDITS AGAINST PRINCIPAL AND INCOME ARE MANY.—The credits allowed against principal are too numerous to set out here, as are also the credits allowed against income, but for a general discussion see Chapter V. In decedents' estates the following may be mentioned: funeral expenses, debts of the decedent, including doctors' bills and nurses' charges, commissions of accountant, counsel fees, and probate court charges. A trustee is ordinarily not allowed credit in the principal account for any payments except distributions made in accordance with the trust instrument, and except for losses which may be suffered for which the trustee cannot be held liable. All expenses of administration of the trust as well as expenses incident to the management of trust property are payable out of income.

In brief, the accounts filed by fiduciaries are statements, in simple form, chronologically arranged, separated as to principal and income, of the financial administration of the estate or trust. The actual forms vary so much that it is impossible to

define or to illustrate a typical account. However, a very simple form of an administrator's account has been inserted, merely as an illustration and not as an authentic form to be followed.

The respective rules and practice of the probate courts of the several states must be carefully studied and noted by the students of those states. In any event, the account acts as a permanent record for the information of all persons interested and enables the court to ascertain the amount due from the fiduciary to creditors, beneficiaries, and all others entitled thereto.

ESTATE OF JOHN DOE, DECEASED

Account of Institute Trust Company, Executor of the Will of John Doe, Deceased

PERSONAL ESTATE

Principal—Dr.

Date			
	Accountant charges itself with the following:		
	To amount of inventory and appraisement as accepted and filed		$35,900.00
	To increase on sale and conversion of securities		
	Bonds of XYZ Corporation sold for	$9,900	
	Appraised at	9,000	
	Gain		900.00
			$36,800.00

PERSONAL ESTATE

Principal—Cr.

Date		
	The accountant claims credit for the following:	
	By costs, probating will, and so forth	$150.00
	By Robert Chew, M.D.—professional services	100.00
	By Brown & Jones, undertakers	300.00
	By amount of unpaid instalments of income tax due	75.00

By Smith & Co.—groceries ordered by decedent	50.00
By fee—filing and settling account	50.00
By commissons of executor, 5%	184.00
By Joseph Cross, Esq.—professional services	500.00
By balance	35,391.00
	$36,800.00

PERSONAL ESTATE

Income—Dr.

Date The accountant charges itself with the following:

To interest received on bonds XYZ Corporation	$540.00
To interest received on mortgage, 14 Maple Avenue	450.00
To interest received on note, Samuel Brown	60.00
To dividends on stock, AB Co.	210.00
To interest on deposit	25.00
	$1,285.00

PERSONAL ESTATE

Income—Cr.

Date The accountant claims credit for the following:

By commissions of executor, 5%	$64.25
By balance on hand	1,220.75
	$1,285.00

REAL ESTATE

Principal—Dr.

Date The accountant charges itself with the following:

To proceeds of sale of 18 Pine Avenue	$10,000.00

REAL ESTATE

Principal—Cr.

Date The accountant claims credit for the following:

By cost of abstract, searches, and so forth	$200.00
By allowance for damage to buildings	100.00
By commissions of executor, 3%	300.00
By balance	9,400.00
	$10,000.00

REAL ESTATE
Income—Dr.

Date		
	The accountant charges itself with the following:	
	To rent, 9 months @ $100 per month, 18 Pine Avenue	$900.00

REAL ESTATE
Income—Cr.

Date			
	The accountant claims credit for the following:		
	By repairs to roof, 18 Pine Avenue	$110.00	
	By taxes	200.00	
	By water rent	25.00	
	By commissions of executor, 5%	45.00	
	By balance	520.00	
		$900.00	

RECAPITULATION

Personal estate, principal, balance	$35,391.00
Personal estate, income, balance	1,220.75
Real estate, principal, balance	9,400.00
Real estate, income, balance	520.00
Total	$46,531.75

DISTRIBUTION ACCOUNT

Date			
	The accountant claims credit for the following amounts paid in distributions, viz.:		
	Household goods, furniture, and so forth, as per inventory and appraisement, delivered to Sarah Doe, widow, specific legatee	$500.00	
	Silverware, jewelry, and so forth, as per inventory and appraisement, delivered to Samuel Doe, son of decedent, specific legatee	400.00	
	Amount paid in general legacies		
	Charles Leach	100.00	
	Philip Jones	900.00	1,900.00
	Balance for distribution		$44,631.75

Affidavit, by accountant, as to correctness of account and of the various items therein, to be appended to the account

PROBATE COURT STATE OF
ESTATE OF JOHN DOE, DECEASED

The Account of Institute Trust Company, Trustee under Will of John Doe, Deceased

PERSONAL ESTATE

Principal—Dr.

Date	The accountant charges itself with the following:		
	To amount awarded by adjudication and settlement of account of executor by probate court		$44,631.75
	Composed as follows:		
	Mortgage—14 Maple Avenue	$9,000.00	
	100 shares, preferred stock, AB Co.	7,000.00	
	Cash	28,631.75	
		$44,631.75	
	To gain on sale and conversion of securities:		
	100 shares, preferred stock of AB Co., sold for	$8,000.00	
	Awarded at	7,000.00	
	Gain		$1,000.00
			$45,631.75

PERSONAL ESTATE

Principal—Cr.

Date	The accountant claims credit for the following:		
	By balance on hand		$45,631.75
	Mortgage, 14 Maple Avenue	$9,000.00	
	Mortgage, 18 Oak Avenue	5,000.00	
	Bonds, City of Keokuk	10,000.00	
	Bonds, City of New York	10,000.00	
	Bonds, City of Chicago	9,000.00	
	Cash	2,631.75	
		$45,631.75	$45,631.75

PERSONAL ESTATE

Income—Dr.

Date The accountant charges itself with the following:

To income from mortgage, 14 Maple Avenue	$450.00
To income from bonds	1,700.00
	$2,150.00

NOTE: The above, of course, to be set out in detail as to different items, and to show income during running of trust

PERSONAL ESTATE

Income—Cr.

Date The accountant claims credit for the following:

By taxes paid on securities held in trust....	$340.00
By commissions of trustee, 5%	107.50
By balance	1,702.50
	$2,150.00

DISTRIBUTION ACCOUNT

Date The accountant claims credit for the following payments in distribution:

To Sarah Doe, widow of decedent.....	$1,700.00
To balance	2.50
	$1,702.50

Affidavit, by accountant, as to correctness of account and of the various items therein, to be appended to account

PROCEDURE IN FILING THE ACCOUNT. —When the time has arrived for an accounting and, accordingly, an appropriate account has been prepared, the usual practice is for the fiduciary to file such account in the proper surrogate's or probate court for audit and settlement. At the time of such filing, it is often required that formal notice be given, usually for a certain number of days, and by publication, directed to all the parties in interest, advising them that such account has been filed and will come before the court for consideration on a

day and at a place named in such notice. Sometimes such formal notice is supplemented by actual notice in writing to all beneficiaries and other persons interested.

On the day fixed, the court considers the account, giving opportunity to all those interested, personally or by counsel, to raise any proper questions concerning the administration of the estate or trust or concerning any items of the account or any of the acts or transactions of the fiduciary. If necessary, the court will hear testimony relative to any matter concerning the estate or trust, or it will call on the attorneys appearing to file briefs of law in support of the contentions made by them in behalf of their clients. In due course, the court enters an order or files an adjudication or order of distribution, usually setting forth the names of the estate or trust, the parties appearing, the questions raised, the decision of the court on such questions, and concluding with a direction that distribution be made of the balance in the fiduciary's hands. In directing distribution, the court, if occasion requires, may require the payment of unpaid and duly proved debts, taxes, and other claims before ordering distribution to the beneficiaries. As a general rule, such accounting is final and conclusive as to all persons legally notified and as to all things appearing in the account; saving, of course, the right of exception and appeal to those feeling themselves aggrieved by the action of the court, a matter which in its detail must be left to the investigation of the

student specially interested. If the court decides that the fiduciary has been guilty of what is generally known as malfeasance or misfeasance or nonfeasance in office, the court will impose a charge upon him or will surcharge him accordingly. For example, if an executor has neglected to collect a debt due the estate, he is liable to be charged with the amount of such debt with interest. Again, if a fiduciary fails to file an account when he should, he may, by proper proceedings, be compelled by the court to file such an account.

Some accounts are full and final accounts of the administration of an estate or trust; some are only partial or periodical—all depending upon the facts and circumstances of the particular estate or trust in question.

DISTRIBUTION AFTER PRELIMINARIES FOLLOWS COURT ORDER.—An order directing distribution having been entered by the court and the time usually fixed by law or by rule of court for filing exceptions having passed and no exceptions having been filed, it is then the duty of the fiduciary to make distribution, as the court has directed, to the respective persons entitled. He should obtain from such persons proper vouchers or releases and, if the rules of court so provide, file such vouchers or releases of record, thus showing his compliance with the order of the court. In some states it is then the practice for the fiduciary to ask for his discharge, particularly if he has been compelled to enter security for the due performance of

his duties, such discharge to be followed by an order releasing his bondsmen from further liability. One other advantage of having a corporate fiduciary might here be mentioned. As a rule, such corporate fiduciary does not have to be bonded with separate surety, and it is therefore not usually necessary, although this is not the universal rule, for such corporate fiduciary to ask for a formal discharge.

FIDUCIARIES' COMPENSATION AND COUNSEL FEES.—In connection with accounting and distribution, it will be well here to consider the questions of compensation payable to fiduciaries and of counsel fees. Unfortunately there is no rule which will act as an absolute guide, nor is there any uniformity in the practice obtaining in the several states. It may be stated, however, as an almost universal practice, that the probate courts are particularly solicitous that the estates and trusts under their care and supervision shall not be unduly burdened by commissions and counsel fees. The question of counsel fees will be considered first. Inasmuch as a fiduciary is held responsible for the proper administration of the estate or trust under his care, he is usually permitted to seek legal advice to guide him when necessary, but, in doing so, he is not permitted necessarily to seek the most eminent and expensive counsel or to incur fees out of all proportion to the amount involved, except, perhaps, when the estate or trust is so involved as to make such a course absolutely necessary. The question of the propriety of the fee or the amount thereof is en-

tirely within the province of the proper court, and no rule can be laid down as to what would be a proper fee in any given case. All the facts and circumstances must be considered in each case and a decision reached accordingly. In some cases the fiduciary will be compelled to pay all or part of the counsel fee incurred by him. (In this connection, the student is referred to the cases of Matter of Smith, 2 Connolly [N. Y.], 418, 431, and Matter of Jones, 28 Misc. [N. Y.], 599, both referred to in Conyngton on Wills, Estates, and Trusts at pages 203 and 206, as containing interesting discussions of what are proper counsel fees in a given case.) The right of a fiduciary to employ counsel is applicable also in the case of corporate fiduciaries. In such cases, the modern—and what may be urged as the best—practice is for such corporate fiduciaries to employ the counsel who served the decedent or his family in his lifetime or who is serving the settlor, saving to such corporate fiduciaries, however, the right to employ counsel of their own selection, if that seems the best course to pursue under all the circumstances. This would be true in case of differences arising between such fiduciaries and others interested in the estate or trust.

HOW FIDUCIARIES' COMPENSATION IS FIXED.—When considering the compensation, usually designated "commissions," payable to fiduciaries, a different question arises. Attorneys' fees are based on special or technical services rendered, and no limit is set thereon by statute or rule of

court. Such fees, to be allowed, must be "reasonable" under all the circumstances. Commissions, however, are not controlled by such a measure. As has already been stated, the office of executor, administrator, or trustee was, in the early days, looked upon as such an honorary one that no remuneration was asked or expected or, in fact, allowed. Such, of course, is not now the fact. Remuneration is asked and, in proper cases, allowed accordingly. In some states, as, for instance, New York and others, the commissions of fiduciaries are fixed by statute; in other states, by a custom among those corporations which do a fiduciary business or by a sort of scale which, in the course of years, the probate courts have developed; whereas in others, the commissions are fixed by the courts by a more or less arbitrary rule. In Pennsylvania, for instance, the Supreme Court has said that the commission is based on two elements, *viz:* the responsibility involved and the work done. The general rule in that state is to allow 5%, with respect to the principal of the personal property accounted for, and 3%, with respect to the proceeds of the sale of real estate accounted for. When income is accounted for, the usual commission is 5% thereon. These commissions are reduced, however, as to principal, if the estate or trust is of a large amount. It is impossible to state here at what figures the changes will occur.

Notwithstanding the statutes fixing commissions payable to fiduciaries and notwithstanding the rules of court applicable thereto, the courts have

quite generally recognized the right of a testator or settlor to fix the commission payable to his fiduciary. They have recognized also his right to enter into an express agreement with his fiduciary regarding the commissions to be charged and collected by him. (In the first case, the decision of the Supreme Court in Hays's Appeal, 183 Pa. 296, is enlightening.) Notwithstanding such an agreement, however, or the statutes and practice already discussed, it may be asserted that if the fiduciary were called upon to perform very special or unusual services, not in contemplation of the parties or not comprehended within the ordinary duties of a fiduciary, as, for example, giving unusual attention to a business in the rehabilitation thereof, or managing a complicated land transaction, the court would doubtless allow commissions in addition to that fixed by the testator or settlor.

If a fiduciary should grossly mismanage a trust or estate in its care, or should be guilty of improper practices with respect thereto, resulting in a loss to the estate or trust, it might forfeit the right to compensation besides being liable to removal from office.

CHAPTER X

Trusts under Deeds, Voluntary and Insurance

THIS chapter will be devoted to a discussion of the creation of trusts by deeds and of certain general principles applicable thereto. The discussions of the administration of trusts under wills (see Chapter V), of investments (see Chapter VII), of taxation (Chapter VIII), of accounting, audit, and distribution, of commissions and counsel fees (Chapter IX), are applicable in so many respects to the trusts to be considered in this chapter, that the questions taken up in those chapters will not again be treated here unless it seems essential to do so.

LIVING OR VOLUNTARY TRUSTS.—Living or voluntary trusts, as we now know them, are of comparatively recent development. In discussing them it might be well here to repeat several things heretofore mentioned (see Chapter V). In order to have a trust there must be property, using the word in its broadest sense, to constitute the subject of such a trust. This is usually spoken of as the *corpus* of the trust. Again, there are always three parties to a trust, to wit: (1) the creator or settlor, (2) the trustee, and (3) the beneficiary or *cestui que trust*. In all trusts the "legal" title is in the trustee and the "equitable" title is in the beneficiary. A

"trust" is not a contract and is therefore not enforceable at law but is the special care of the court of equity or chancery. The interest of the trustee and of the beneficiary in the trust are both called "estates." All of these fundamental principles must be kept in mind in any study of trusts. It would be of profit to the student to take up the development of "equity jurisdiction" in England as distinguished from the jurisdiction of the common law. These distinctions exist quite generally in this country because equity was brought here from England and is used as a separate system to supplement the defects of the common law.

As was said in discussing the administration of trusts under wills, trusts may be created for almost any purpose not unlawful and not in violation of the rule against perpetuities or the laws against accumulations. One probate judge, speaking of a special kind of trust, intimated that trusts may be as varied as the ingenuity of counsel may devise or the vagaries of the testator suggest. (See Shuster's Estate, 26 Pa. Dist. Rep. 232.)

ESSENTIALS IN CONTENT AND NOT IN FORM OF DEED.—The deed or declaration of trust or other instrument by which the trust is created or declared by living persons does not necessarily need to follow any particular form or arrangement so long as certain essentials are contained therein. These instruments are usually called deeds *inter vivos*—that is, between living persons—and are commonly or colloquially called

"living trusts." They are also called "voluntary trusts" to distinguish them from "involuntary trusts." "Voluntary trusts" are those which constitute an obligation imposed by one and voluntarily accepted by another, whether such obligation is imposed by will or by deed *inter vivos*. "Involuntary trusts" are those which are imposed upon one involuntarily, as, for instance, when "A," having in his hands money belonging to "B," purchases real estate and takes title in his own (A's) name. In such case equity imposes on "A" the trust to hold such property for "B." Such trusts will not be discussed here, nor will what are known as "implied trusts" or "resulting trusts" or "constructive trusts." (They are briefly outlined in Conyngton on Wills, Estates, and Trusts, 3d Ed., Chap. XIV.)

In passing, it may be said that one of the practical advantages of a living trust is that the creator has the opportunity, in his lifetime, of observing the operation and effect of the trust created by him, which, of course, is not true with respect to trusts created by will.

USUAL CONTENT OF THE DEED FORM.—As stated before, there is no uniformity in the forms used for the creation of trusts by deed or agreement. Some prefer the formal deed; others the declaration of trust. If real property is concerned, the formal deed would seem more appropriate, as would also be the case when both real and personal property form the subject matter of the

trust. When personal property only is the subject of the trust, perhaps the declaration of trust would be sufficient. It is the practice in some cases to use the deed poll; that is, an instrument, not united in by the trustee but executed by the grantor or settlor only, usually beginning with the words: Know All Men By These Presents, That I (or We) and so forth. In such cases the trustee should execute an acceptance of the trust by a separate instrument.

The deed or declaration of trust usually contains the following parts or paragraphs, *viz:*

1. The date, names of the settlors, and names of the trustees

2. The assignment or grant of the property intended to constitute the subject of the trust, to the trustee

3. The *habendum* or statement as to how the property is to be held, to wit: "in trust, to, for, and upon the following uses, trusts, and purposes, to wit: In trust" and so forth

4. Manner in which and persons to whom the income is to be paid

5. Manner in which and the persons to whom the *corpus* of the trust is eventually to be distributed

6. Special clauses relating to payments out of the *corpus* of the trust for particular purposes, *viz:* for higher education of beneficiaries; to meet unusual emergencies or unusual expenses affecting the life beneficiaries

7. Spendthrift clauses, whenever permitted by

law; that is, clauses preventing beneficiaries from pledging their income or shares of principal, from anticipating them, or from making them subject to execution for their debts, and so forth (For a fuller discussion of this clause see Chapter V.)

8. Powers of the trustee (They would be quite similar to the powers conferred upon trusts under wills, as fully outlined in Chapter V; including, perhaps, in addition, the right on the part of the trustee, if a corporate fiduciary, to purchase securities from its investment department at the price at which such securities are offered to the public; also including the right to employ agents and attorneys in the administration of the trust; also to compromise claims by or against the trust; also to pledge the securities of the trust for such loans as the trustee deems necessary or to mortgage the real estate for the same purpose.)

9. Provisions fixing the compensation of the trustees both as to income and as to *corpus* of the trust

10. Permitting the trustee to make distribution of the *corpus* in kind and to fix the valuations of the property distributed

11. Authorizing the trustee to hold the trust property in his own name disclosing no trust (This method is seldom used.)

12. Method of appointment of a new trustee in the event of the death, resignation, or refusal to act of the trustee originally named

13. Right of revocation, in whole or in part, by

the settlor, or the declaration by him that the trust is to be irrevocable

14. Right to add to the trust real or personal property or both, to be held upon the same uses and trusts as the property originally assigned or conveyed is held

15. Right to amend the uses or trusts or to declare entirely new uses and trusts with respect to the property or subject of the trust

16. *Testimonium* or witness clause, setting forth that the parties to the trust, namely, the settlor and the trustee, have severally set their hands and seals to said deed or declaration of trust on the day in said instrument first appearing (The deed or declaration of trust should also be duly acknowledged by all parties thereto. This acknowledgment must be in accordance with the laws of the state wherein the trust is to be administered and also in accordance with the laws of the state in which any real estate described in said deed is situate, if it is situate in another state. This acknowledgment is necessary to enable said deed or declaration of trust to be recorded. In some cases, instead of recording the deed or declaration of trust itself, separate deeds for the real estate are executed to the trustee and those are recorded.)

WHEN IT IS INADVISABLE TO PLACE THE DEED ON RECORD.—In cases in which the grantor reserves the right to revoke the trust or to change the beneficiaries, it is often inadvisable to place a deed containing all the provisions of the

trust on record so that it becomes public information. The same may be true when a large part of the property of the trust is personal property and most of the provisions of the trust relate to such property. In most such cases, the real estate is conveyed to the trustee by absolute conveyance, the trustee issuing his declaration of trust setting out the terms and conditions under which he holds the title; or the conveyance is referred to in a trust agreement between the parties, wherein are specified the terms under which the real estate, as well as any personal property which forms a part of the subject of the trust, is to be held. The trustee, of course, joins in the execution of such an agreement to signify his acceptance of the trust and his agreement to administer it according to the terms thereof.

The deed or declaration of trust, having been duly executed and acknowledged, should also immediately be recorded, if real estate or property is conveyed thereby (unless the real estate is conveyed to the trustee by separate conveyance, in which case the separate conveyance should of course be recorded), and the securities constituting the subject of the trust should immediately be registered in the name of the trustee so as to indicate the trust, *viz:* "ABC Trust Company, Trustee under Deed dated January 1, 1926"; such registration, of course, to be varied in accordance with the practice of any particular state. This practice is not usually required in the case of coupon bonds, although, even in such cases, the practice obtains in some states of regis-

tering them for the protection of the beneficiaries of the trust.

SETTLEMENT OF A LIVING TRUST.—All this preliminary work having been duly attended to, the trustee is then prepared to proceed with the administration of the trust; namely, the collection of income and appropriate distribution thereof to the life or limited beneficiaries, after deduction, from said income, of all proper costs, taxes, charges, commissions, and expenses of administration; and, in due course, the distribution of the *corpus* of the trust to the persons duly entitled thereto. Usually settlements of living trusts are made out of court, that is, without having an account of the administration of the trust filed by the trustee and approved by a court before distribution. If, however, all or some of the beneficiaries are not satisfied and are not willing to accept the distribution which is proposed and to give their full receipts therefor and release the trustee from any further liability, settlement of the accounts by a court of competent jurisdiction is necessary. All of these details have been quite fully outlined in chapters referred to in the first paragraph of this chapter.

ADVANTAGES OF A LIVING TRUST.—The advantages of a living trust, especially as to possible saving of inheritance, succession, or death taxes, are very complex in their character. The limitations of this text will not permit their being discussed at length here. A word of warning might be interposed here to the effect that a living trust

should never be sold on the basis of a saving in taxes to be accomplished by means of its execution. The tax laws are too frequently changed and too uncertain in their application to warrant such a practice. The student is referred to various articles from time to time appearing in the proceedings of the conferences of the Trust Company Division of the American Bankers Association, the several financial publications carrying trust material, and to the textbook entitled Living Trusts, by Stephenson, as well as to the discussions appearing in the several tax services which are issued. One advantage of a living trust is almost self-evident. On the death of the settlor, no administration needs to be raised or will proved; the trust goes on as provided for until its termination.

If the trust is declared in the form of a deed poll, executed by the settlor only, the practice is for the trustee to accept the trust by a writing added to the deed poll and duly executed and acknowledged by him.

ON THE REVOCATION OF TRUSTS.—The question of whether a trust shall or shall not be revocable by the settlor, acting either alone or in conjunction with others, is a very important one and one which should receive the most careful consideration from the settlor. It may be stated, as a general rule of law, that a trust created by an instrument containing no provision relating to revocability is not revocable, on the general principle that when a title has once passed by deed from one to

another it cannot be withdrawn, unless such deed contains some clause of defeasance or right to destroy the estate granted. Irrevocable deeds by young persons, especially those just of age, by persons whose manner of living is not fixed, or, in fact, by any persons, except those whose family or circumstances are not apt to change materially, are fraught with dangers and disagreements. In the writer's experience, several cases have arisen in which persons, who created trusts and solemnly declared they desired them to be irrevocable, later changed their minds and then resorted to every legal and equitable means at their command to have the trusts set aside. In some cases, in the attempt to accomplish their object, these persons used what were mere legal "subterfuges"; and sometimes they were successful.

PROCEDURE WHEN RIGHT OF REVOCATION IS RESERVED.—If the right of revocation has been reserved to the settlor, either by himself or in conjunction with others, the method of accomplishing the revocation of the trust, in whole or in part, is usually comparatively simple. An instrument, which recites the deed or declaration of trust and refers to the right of revocation reserved therein, which sets forth the desire of the parties to revoke the entire trust—or sets out the securities and property as to which the trust is to be revoked —and which requests the reconveyance and assignment of the securities and property in question, should be executed and acknowledged by the par-

ties entitled to revoke, with the same formality as was the deed or declaration of trust itself. Such instrument of revocation is then delivered to the trustee, who thereupon reconveys the real estate in question or reassigns, transfers, or delivers the securities in question to the settlor; thereafter, the settlor is entitled to hold them free and clear of all trusts. No particular form of revocation is necessary so long as it contains the essentials above set forth and is executed and acknowledged and delivered as indicated. It may be here remarked that the retention of right to revoke does not render the trust instrument testamentary in character. (See People v. Northern Trust Co. 289 Ill. 475, 124 N. E. 662.)

THE QUESTION OF CREDITORS' RIGHTS.—The question has been raised, however, as to whether the right to revoke does not give creditors of the settlor the right to obtain from the court an order to compel the settlor to exercise such right, in order that the trust property may be used to pay the debts of the settlor. The law on this question is very much in conflict, as appears by the decisions of the courts of the several states.

LIFE INSURANCE TRUSTS.—One of the most recent forms of living trusts, at least one whose extensive development has been only comparatively recent, is the so-called life insurance trust. This term relates to trusts wherein life insurance is an important factor and the trusts with respect thereto have been subdivided into so-called "funded trusts"

and "unfunded trusts", both of which, especially as to their form, will be considered more or less in detail. These two forms of trust have been very succinctly described in the recent book on the subject, entitled Creating and Conserving Estates, by Robinson and Woods, 1926, page 72, as follows:

> Briefly, the life insurance trust is an agreement created in the lifetime of an individual, or by a partnership or corporation, under which an arrangement is made with a trust company by which policies of insurance are made payable to the trust company as trustee, to be used for purposes designated, and to the trust company is delegated the power of carrying out these instructions either during lifetime, should the policies mature prior to death, or at death. These trusts are, to state the matter simply, divided into what are known as funded life insurance trusts and unfunded life insurance trusts. In the case of a funded life insurance trust, the insured deposits with the trust company, under the trust agreement, life insurance policies payable to the trust company, together with securities or cash sufficient to pay from their income the premiums on the policies. The securities, cash, proceeds of the policies, and the investments made with the cash are, by the terms of the trust, made effective for their purpose when the time for their use arrives.

In the same work (at page 72), appear what might be termed the underlying reasons which prompted the formation of life insurance trusts:

> 1. Life insurance is the surest way of replacing earning power, creating estates, and furnishing funds with which to pay expenses, taxes, and debts. 2. A trust company is the nearest approach to personal ability that can be secured for the management and growth of an estate. 3. Life insurance linked with trust company service combines replacement of earning power with personal ability. 4. Attention and thought of thinking men in both lines of effort have developed the very modern idea of what is known as the life insurance trust.

It is with pardonable pride that the writer, in this connection, quotes from the work entitled Liv-

ing Trusts, Including Life Insurance Trusts, by Stephenson, 1926, page 19, *viz:*

> To the Provident Life and Trust Company of Philadelphia is due the distinction of first actively advocating and planning insurance trusts. The date of the first insurance trust received by this company was January 27, 1877. A facsimile of this, the oldest life insurance trust agreement on record, is to be found in Trust Companies, June, 1926, page 876.

Reference to this trust also appears in Robinson and Woods, as above-mentioned, page 100, on which page will also be found the statement, attributed to Mr. Stephenson, the author of the above work on Living Trusts, to the effect that funded insurance trusts were known and legally approved in England as early as 1851.

CONSIDERATIONS THAT LED TO ESTABLISHMENT OF LIFE INSURANCE TRUSTS.—The main underlying motives prompting the establishment of life insurance trusts were: First, the desire to conserve the proceeds of the insurance, experience having shown that a large percentage of insurance money was rapidly dissipated by the recipients; second, the desire to provide an administration of insurance money more flexible and adaptive to the special needs of the insured and his family than was possible, under the greatly varied and excellent optional methods of settlement devised by the insurance companies to protect the proceeds of life insurance policies; third, to minimize inheritance and death taxes whenever possible; fourth—which applied particularly to funded trusts—to save the cost, delay, and inconvenience

of administration of the securities in the probate court; and fifth—which relates to funded trusts alone—to build up an estate that could not well be created otherwise. So much has been written, spoken, and published regarding life insurance trusts and their many advantages, and so many well prepared and striking advertisements have appeared, that it seems but vain repetition here to speak further about insurance trusts and their advantages, other than perhaps to outline their forms and make some observations with respect to the actual administration thereof in practice.

UNFUNDED TRUSTS.—As to the unfunded trusts, they usually take the form of a deed or declaration of trust between the insured and a trustee, wherein the insured declares that he has or will have made payable to the trustee the policies, enumerated in the deed or declaration or in the schedule annexed thereto, either at his death or at the maturity of the endowment in said policies; with the provision that the insured will pay all premiums due or to become due, with respect to said policies, and that he expressly exonerates the trustee from any liability for such payment. It is then further provided that the trustee shall hold the proceeds of the insurance policies when received, in trust, for the uses and purposes therein set forth; usually to pay income to the insured, from the proceeds of matured endowments; to his wife, from the proceeds of policies collected at the death of the insured; or to his children, for their lives, with directions to pay the

corpus of the trust to others at certain times. The trusts are greatly varied, and an almost infinite variety of provisions may be made, as outlined in this chapter when speaking of living trusts generally. Special provisions, to care for special emergencies, for the education of the beneficiaries of the trust, or for the maintenance of those unable to care for themselves, may also be made.

POWERS OF THE TRUSTEE.—In these trusts it is usual to confer upon the trustees powers somewhat as follows:

(Form Conferring Powers on Trustees)

. . and said trustee shall hold the proceeds of such policy or policies so becoming payable as aforesaid; and invest, reinvest, and keep the same invested in such securities as said trustee may deem prudent, without restriction to so-called legal investments for trustees; with full power and authority to purchase investments and securities as aforesaid, at a premium, and to deduct such premium from income or to purchase investments and securities, at a discount, and to credit such discount to principal; and with full power and authority to purchase from the executor of my will or the administrator of my estate, as investments of any trust hereunder, any of the securities or property which may constitute my estate, at such price or prices as to said trustee, under this deed, may seem best; and with full power and authority to loan, to the executor of my will or the administrator of my estate, such sum or sums of money as said trustee may think best, taking as collateral security therefor any of the investments or securities which may constitute part of my estate; and with full power and authority, from time to time and at any time, to change and convert and sell and dispose of all or any securities, investments, real estate, and property which may, from time to time or at any time, comprise the capital or principal of said trust, either at public or private sale, for such prices and on such terms as to said trustee may seem fit and proper, and to make, execute, and deliver to the purchasers thereof good and sufficient deeds of conveyance therefor, and all assignments, transfers, and other legal instruments

either necessary or convenient for passing the title and ownership thereto, free and discharged of all trusts, without liability or responsibility on the part of any purchasers to see to the application of the purchase money or to the performance of said trust, and to manage and control said trust estate; and said trustee shall collect and receive the income, issues, and profits thereof, and after deducting all lawful costs, charges, taxes, and expenses, incident to the care and management of said trust, then said trustee shall pay over and apply the net income and hold, pay over, and distribute the capital or principal of said trust, as follows, to wit: . . .

BENEFITS TO ESTATE FROM TRUSTEE'S POWERS.—As insurance proceeds are usually paid in cash or its equivalent, the benefit to the estate of the insured, resulting from power in the trustee to purchase securities from such estate or to loan money thereon, is quite apparent; it serves to put the executor or administrator in possession of cash to meet taxes, debts, and probate expenses at a time, perhaps, when to sell securities to raise cash might result in a considerable loss to or shrinkage of the estate.

In such unfunded trusts it is also usual to insert, in behalf of the trustee, provisions that he shall not be compelled to litigate in order to collect proceeds of insurance policies unless fully indemnified against all expenses and liabilities.

RIGHTS OF INSURED.—In behalf of the insured, provisions are inserted reading somewhat as follows:

(Form of Provisions in Unfunded Trust)

I hereby reserve unto myself by my own act alone, without the consent or approval or joinder of said trustee or any beneficiary of this trust, full right, power, and authority:

A. To change and successively change the beneficiary in

any policy or policies which may at any time comprise a part of the capital or principal of said trust

B. To obtain and receive from the respective insurance companies such advances or loans, on account of any policy or policies which may at any time constitute a part of the capital or principal of said trust, as may be available from time to time

C. To accept, collect, and receive in cash or otherwise dispose of all distributive shares of surplus or dividends which may from time to time be allotted and set apart to any policy or policies which may at any time constitute a part of the capital or principal of said trust; also to accept, collect, and receive all or any other cash payments available or accruing from any of said policies.

In order to protect the insurance companies, a clause somewhat as follows is inserted in the deed or declaration:

I hereby exonerate and release the life insurance companies issuing the policies, which may at any time constitute a part of the capital or principal of said trust, from any responsibility to see to the execution or performance of the trust created by this deed.

SOME POINTS REGARDING UNFUNDED TRUSTS.—While the right to change the beneficiary at will practically amounts to a revocation, it is usual to insert a special right, on the part of the insured, to revoke. When the deed or declaration is executed, the policies are usually delivered to the trustee; and this practice is by far the better one although it is neither legally necessary nor could it, in fact, be insisted upon. Under unfunded trusts, the policies are generally made payable to the trustee by change of beneficiary and not by assignment; and this plan, with slight variation in details of practice, is followed by most of the insurance

companies. If, however, the trust is made irrevocable, the policies should either be made irrevocably payable to the trustee or irrevocably assigned to him. When policies are to be received under an unfunded trust by the trustee, in order to make the proceeds of such policies payable to the trustee at maturity or at death, as the case may be, all such instruments must be executed as may be required by the special provisions of the policies or the rules of the insurance companies. When the deed or declaration, accompanied by the policies all duly made payable to the trustee, is delivered to the trustee, practically nothing further needs to be done until the proceeds of the policies become payable to the trustee. The practice quite generally now obtains, however, among trust companies acting as trustees under unfunded insurance trusts, to list the policies on their books and to make a note of those delivered or received, so as to keep a complete record of the transaction. As to taxation, the student is referred to the chapter dealing with that subject, although it might be well here to reiterate that, as a general proposition, insurance money payable to a named beneficiary, including a trustee under a deed or declaration, is not taxable on the death of the insured, whereas it would be if made payable to the estate of the insured—except, of course, as to amounts in excess of $40,000, according to the provision now in force in the Federal Estate Tax Law.

The following form is a fair illustration of an unfunded trust:

LIFE INSURANCE TRUST

(Unfunded)

KNOW ALL MEN BY THESE PRESENTS, That I, ..., for the purpose of settling and securing the proceeds of the policies of insurance issued on my life set out and described in a certain Schedule hereunto appended, marked "Exhibit A," to be deemed and taken as a part of this Deed, with the same and like force and effect as if the full contents thereof were incorporated herein, upon the uses and trusts herein limited and declared, if said proceeds should become payable by reason of my death while said policies are in force, have caused said policies and will cause any policy or policies which may be issued in the place of any or all thereof, either by conversion, or reissuance or consolidation or otherwise, to be made payable in event of my death as aforesaid to INSTITUTE TRUST COMPANY, its Successors and Assigns, In Trust, nevertheless, upon the uses and trusts hereinafter set out, without any liability or responsibility on the part of said Trustee for the payment of any premiums or any other charges at any time to fall due on said policies, it being expressly understood and agreed that said premiums and charges shall be paid by me when and as the same shall become due and payable.

FIRST: At the maturity of the endowment in any policy now or hereafter constituting a part of the capital or principal of said Trust which may be an endowment policy, to permit and suffer me to collect and receive the proceeds of such policy so becoming payable, clear of all trusts, without any charge for commission thereon.

SECOND: If any policy or policies which may at any time constitute a part of the capital or principal of said Trust should become payable by reason of my death while any of such policies are in force, said Trustee shall collect and receive the proceeds thereof remaining after deduction of any then outstanding loans or advances either heretofore made to me or which may hereafter be made to me by the Insurance Companies issuing the same on account of any of said policies; and said Trustee shall hold the proceeds of such policy or policies so becoming payable as aforesaid and invest, reinvest, and keep the same invested in such securities as said Trustee may deem prudent, without restriction to so-called legal investments for Trustees; with full power and authority to purchase investments and securities as aforesaid at a premium and to deduct such premium from income, or to purchase investments and securities at a discount and to credit such discount to principal; and with full power and authority to purchase from the

Executor of my Will or the Administrator of my estate, as investments of any Trust hereunder, any of the securities or property which may constitute my estate, at such price or prices as to said Trustee under this Deed may seem best; and with full power and authority to loan to the Executor of my Will or the Administrator of my estate, such sum or sums of money as said Trustee may think best, taking as collateral security therefor any of the investments or securities which may constitute part of my estate; and with full power and authority from time to time and at any time to change and convert and sell and dispose of all or any securities, investments, real estate, and property which may from time to time or at any time comprise the capital or principal of said Trust, either at public or private sale, for such prices and on such terms as to said Trustee may seem fit and proper, and to make, execute, and deliver to the purchasers thereof good and sufficient deeds of conveyance therefor, and all assignments, transfers, and other legal instruments either necessary or convenient for passing the title and ownership thereto, free and discharged of all trusts, without liability or responsibility on the part of any purchasers to see to the application of the purchase money or to the performance of said Trust, and to manage and control said trust estate; and said Trustee shall collect and receive the income, issues and profits thereof, and after deducting all lawful costs, charges, taxes, and expenses incident to the care and management of said Trust, then said Trustee shall pay over and apply the net income and hold, pay over, and distribute the capital or principal of said Trust, as follows, to wit:

NOTE: Provisions for the payment of the net income and for the subsequent disposal of the principal vary with each particular case and of course are adapted to meet the desire of the Settlor.

THIRD: I hereby order and direct that all the shares of income and principal by this Deed given to or directed to be held for the use and benefit of the several and respective beneficiaries in the Trust in this Deed set out, shall not be in any way or manner subject or liable to their or any of their anticipation, sale, pledge, debts, contracts, engagements, or liabilities, and shall not be subject or liable to attachment or execution or sequestration under any legal or equitable or other process.

FOURTH: I hereby reserve unto myself by my own act alone, without the consent, or approval or joinder of said Trustee or any beneficiary of this Trust, full right, power, and authority:

a. To change and successively change the beneficiary in any policy or policies which may at any time comprise a part of the capital or principal of said Trust

b. To obtain and receive from the respective Insurance Companies such advances or loans on account of any policy or policies which may at any time constitute a part of the capital or principal of said Trust, as may be available from time to time

c. To accept, collect, and receive in cash or otherwise dispose of all distributive shares of surplus or dividends which may from time to time be allotted and set apart to any policy or policies which may at any time constitute a part of the capital or principal of said Trust, also to accept, collect, and receive all or any other cash payments available or accruing from any of said policies.

FIFTH: I hereby exonerate and release the Life Insurance Companies issuing the policies which may at any time constitute a part of the capital or principal of said Trust from any responsibility to see to the execution or performance of the Trust created by this Deed.

SIXTH: I hereby exonerate and release said Trustee, except at its own option, from any duty or responsibility of entering into or maintaining any litigation or instituting any proceedings to enforce payment of the proceeds of any of the policies which may at any time constitute a part of the Trust created by this Deed, until said Trustee shall have been indemnified to its entire satisfaction against all expenses and liabilities to which in the judgment of said Trustee, it may be subjected by reason of such action on its part.

SEVENTH: I hereby reserve the right to add at any time to the capital or principal of said Trust any policies now issued or which may hereafter be issued on my life, by causing the proceeds thereof to be made payable in event of my death to said Trustee, such additional policies and the proceeds thereof to be held by said Trustee upon the same uses and trusts and with the same and like force and effect as if they had originally constituted a part of the capital or principal of said Trust.

EIGHTH: I hereby reserve to myself the right, by any proper instrument or instruments in writing, duly executed under my hand and seal, at any time hereafter, to revoke, alter, vary, annul, and change this Deed and all or any of the uses and trusts and powers therein declared or which may hereafter be declared, and to limit and declare new uses and trusts, and to confer upon the Trustee named in this Deed other or additional powers, and to lodge such instrument or instruments with said Trustee, whereupon the capital or principal of the Trust created by this Deed shall thereafter be held by said Trustee subject to such new uses and trusts and with such other and additional powers; provided, however, that if this Deed and the uses and trusts thereunder shall have been revoked or annulled by me, either in whole or in part,

then and in such case said Trustee shall thereupon release all right, title, interest, and ownership which said Trustee may have acquired in and to any of said policies as to which such instrument or instruments of revocation and annulment may relate, so that the same shall thereafter be held, possessed, and enjoyed by me absolutely free, clear, and discharged of and from all the trusts or limitations and of and from all the terms and provisions of this Deed.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ..... day of ..... in the year of our Lord One Thousand Nine Hundred and Twenty-six (1926).

Signed, Sealed, and Delivered :
in the presence of us :
..... :
..... :

.....(SEAL)

Exhibit A, mentioned in and intended to be taken and considered as part of the foregoing Deed made by ..... to Institute Trust Company of Philadelphia, dated the ..... day of ..... A.D. 1926, in the same manner and with the same effect as if this Exhibit were incorporated in the body of said Deed:

(Policies are listed here)

Above approved:

.....

Settlor

Institute Trust Company hereby accepts the Trust under the foregoing Deed.

WITNESS the corporate seal of said Institute Trust Company, duly attested, this ..... day of ..... A. D. 1926.

Sealed and Delivered in the :
presence of us :
:
..... :
..... :
:
:
:

INSTITUTE TRUST COMPANY
By
.....
President
Attest:
.....

NOTE: Appropriate Certificates of Acknowledgment to be added

FUNDED TRUSTS ARE RELATIVELY COMPLEX.—The forms incident to funded trusts and the practice with respect thereto are more complex. A deed or declaration of trust is entered into between the settlor and the trustee whereby it is set forth that the settlor conveys, assigns, transfers, sets over, and so forth, to the trustee, certain property, securities, and life insurance policies therein very specifically enumerated or set forth, in a schedule annexed, to be held in trust, to hold the property, collect the income, and, in due course, to collect the proceeds of the policies, at maturity or on the death of the settlor, and to pay and apply the income somewhat as follows:

(Form Conferring Powers on Trustees

A. During the lifetime of said settlor, said trustee shall expend, use, and apply so much of said net income as may be necessary to pay all premiums which may, from time to time, become due and payable, on account of all insurance policies on the life of said settlor, at any time forming a part of the capital or principal of the trust created by this deed. If the net income in the hands of said trustee should at any time be insufficient to pay any or all such premiums in full, on the respective due dates thereof named in said insurance policies, and if said settlor should not pay to said trustee, as hereinafter provided, such sum or sums of money as may be necessary to enable said trustee to pay all such premiums in full, on the respective due dates thereof named in said insurance policies, then and in such case said trustee shall have the right and is hereby fully authorized and empowered either (1) to borrow, upon any of said insurance policies on the life of said settlor or upon any one or more of the securities constituting a part of the capital or principal of said trust, such sum or sums of money as may be necessary to enable said trustee to pay all of the abovementioned premiums, in full, before the expiration of the grace period mentioned or provided for in said policies; or (2) to surrender any or all of said policies of insurance on the life of said settlor and collect the cash surrender values thereof and add said

cash surrender values to the capital or principal of said trust, whichever course of action, in the opinion of said trustee, in the exercise of its sole and unrestricted judgment, may seem most advantageous to said trust.

The next step in the procedure, then, is to pay the balance of the income to the settlor or some one else for life, with further provisions, almost without limit or variation, somewhat as above outlined with respect to unfunded trusts, observing carefully, of course, the limitations heretofore outlined with respect to the rule against perpetuities and the law against accumulations. The powers conferred upon the trustee in such a trust are quite similar to the powers generally conferred upon trustees, under deeds; as they have already been fully set forth in this chapter, they need not be enumerated here again.

IMPORTANT MATTERS THAT FOLLOW EXECUTION OF A DEED OF TRUST.—The deed or declaration of trust having been duly executed and acknowledged by both the settlor and the trustee and the policies and securities having been delivered to the trustees, there are a number of matters to be attended to immediately which merit special mention. In the case of funded trusts, the better practice, almost universally followed, is for the policies to be irrevocably assigned to the trustee under the deed or declaration, such assignment in terms to provide that the insurance companies shall be exonerated from any duty or liability to see to the application of the proceeds of the policies, when collected by the trustee. An assignment is desirable

because the trustee, by reason of his duty to see to the payment of premiums, has a real interest in the policy; he should not be deprived thereof without his consent.

Another matter needing special consideration relates to the precautions to be taken by the trustee for the payment of premiums as and when they become due. The failure to pay promptly might result in the lapse of the policies and occasion considerable loss to the trust. Although there appear to be no adjudicated cases on the subject, the trustee, in such an event, would undoubtedly be held liable. Some corporate fiduciaries have considered this risk so great and so out of proportion to the fees received that they have declined to undertake such trusts. The practice followed by most corporate fiduciaries transacting this sort of business is to list the policies with the other investments in the trust and to note the due dates of the premiums; also, when the same are paid, this record is checked at very frequent periods; and, in addition, as a double check, a tickler card system is kept by a person or department other than the one attending to the payment of the premiums. As a further protection, the trustee, of course, as an assignee of the policy, usually receives advance notices from the insurance companies, setting forth the amount and due dates of the premiums. It is also the usual practice to set up on the books the increase in the surrender value of the policies due to their continuance in force by the payment of premiums.

SOME DISTINCTIONS BETWEEN FUNDED AND UNFUNDED TRUSTS.—In unfunded trusts, some corporate fiduciaries list the policies on their records at the face value; others do so at a nominal value. This listing is done so that a check may be kept on policies coming in and going out. As to funded trusts, the practice usually obtains of putting the policies on the books at the surrender value at the date of acquisition by the trustee, to be increased from time to time as premiums are paid. Powers similar to those outlined above, with respect to unfunded trusts, are generally conferred upon trustees in funded trusts, with such additional powers, with respect to the securities constituting a part of the trust, as may be especially appropriate. These powers are usually very broad and varied; so much so, in fact, that it would not be practicable to state them in full here. The student should make a study of the many different forms available.

In funded trusts a clause somewhat in the following language is used relative to dividends on policies, *viz:*

DIVIDENDS ON LIFE INSURANCE POLICIES: Said trustee shall have full power and authority to apply any dividends or shares of surplus, which may become payable on account of the life insurance policies aforesaid, in part payment or abatement of any premiums which may become payable on account of said policies; or said trustee may, in its discretion, collect in cash all dividends or shares of surplus aforesaid; provided, however, that all dividends or shares of surplus, which may be so collected in cash, shall form part of the general income of said trust and shall be paid, applied, and distributed by said trustee as such.

In addition, it is also usual to add spendthrift clauses, tax clauses, and, when appropriate, revocation clauses somewhat as follows:

PROVISION FOR PROTECTION OF BENEFICIARIES: It is hereby expressly declared that, so far as may be permissible in law, all shares of principal and income, by this deed given to or directed to be held for the use and benefit of the several and respective beneficiaries mentioned or set out in the trust declared by this deed, shall not be in any way or manner subject or liable to their or any of their anticipation, sale, pledge, debts, contracts, engagements, or liabilities and shall not be subject or liable to attachment or sequestration, under any legal or other process.

TAXES: If any estate tax, inheritance tax, succession tax, transfer tax, or any other tax in the nature of any thereof, should become payable upon the interests or estates of any of the beneficiaries of said trust, then and in such case all taxes, as aforesaid, shall be paid out of the capital or principal of the trust by this deed created, so that said interests or estates shall be free and clear of all taxes as aforesaid.

REVOCATION: The right is hereby reserved unto said settlor, by any proper instrument or instruments in writing, duly executed under his hand and seal, at any time hereafter, to revoke, alter, vary, annul, and change this deed and all or any of the uses and trusts and powers, therein declared or which may hereafter be declared; and to limit and declare new uses and trusts, and to confer upon the trustee named in this deed other or additional powers, and to lodge such instrument or instruments with said trustee; whereupon the capital or principal of the trust created by this deed shall thereafter be held by said trustee, subject to such new uses and trusts and with such other and additional powers; provided, however, that if this deed and the uses and trusts thereunder shall have been revoked or annulled by said settlor, either in whole or in part, then and in such case said trustee shall thereupon assign, transfer, convey, and set over unto said settlor all right, title, interest, and ownership which said trustee may have acquired in and to the whole of the trust estate or that part thereof to which such instrument or instruments of revocation and annulment may relate, so that the same shall thereafter be held, possessed, and enjoyed by said settlor, absolutely free, clear, and discharged of and from all the trusts or limitations and of and from all the terms and provisions of this deed.

The consequences of an irrevocable trust are obvious. Accordingly, care should be taken to explain to clients that once an irrevocable trust is made, there is no power in the trustor to modify or annul its provisions.

If it is desired that the trust shall be irrevocable, a clause similar to the following may be inserted in the deed or declaration of trust, *viz:*

IRREVOCABLE: Settlor hereby declares that he has been fully advised as to the legal effect of the execution of this deed of trust and that he has given full consideration to the question whether the trust, hereby created, shall be revocable or irrevocable, and he hereby declares the same to be irrevocable and that it shall stand, without power in him at any time to revoke, change, or annul any of the provisions herein contained.

The right to add to the trust, either policies or securities or both, is also a provision usually appearing in the deed or declaration of trust.

FEES AND COMMISSIONS.—Some corporate fiduciaries charge initial fees on taking a funded or unfunded trust; others do not. The practice is not uniform. Most corporate fiduciaries collect fees or commissions at the termination of the trust and also when policies or securities are withdrawn; in regard to unfunded trusts some corporate fiduciaries make no charge whatever unless the trust actually begins to operate upon their collection of the proceeds of policies. The matter of fees and commissions is more or less an unsettled question; it is receiving careful consideration by corporate fiduciaries throughout the country. The Trust Company Division of the Amer-

ican Bankers Association is making a special study of the subject.

While much more might be said here regarding both unfunded and funded trusts, as well as living trusts in general, the student who desires to make a more exhaustive study of the whole subject is referred to the textbooks mentioned in this chapter.

The form which follows, several paragraphs of which have already been discussed in the text, is inserted here as an illustration:

FUNDED INSURANCE TRUST

THIS DEED OF TRUST Made this .....day of ..... A.D. 1926, Between .... (hereinafter called Settlor), of the one part, and INSTITUTE TRUST COMPANY (hereinafter called Trustee), of the other part, WITNESSETH:

FIRST. Creation of Trust: That for and in consideration of the sum of One Dollar unto said Settlor in hand paid by said Trustee at the execution and delivery hereof, the receipt whereof is hereby acknowledged, and for the purpose of settling and securing the moneys, investments, securities, life insurance policies, real estate, and property hereinafter mentioned, upon the uses and trusts herein limited and declared, said Settlor has granted, bargained, sold, assigned, transferred, and set over, and does hereby grant, bargain, sell, assign, transfer, and set over unto said Trustee, its Successors and Assigns, all the moneys, investments, securities, life insurance policies, real estate, and property (the receipt whereof is hereby acknowledged) set out and described in a certain Schedule hereunto appended marked "Exhibit A," to be deemed and taken as a part of the Deed, with the same and like force and effect as if the full contents thereof were incorporated herein, which said moneys, investments, securities, life insurance policies, real estate, and property, together with all other moneys, investments, securities, life insurance policies, real estate, and property of every kind or nature which may at any time under the terms of this Deed constitute the capital of the Trust by this Deed created, shall be held by said Trustee upon the following uses and trusts, to wit:

SECOND. Terms of the Trust: Said Trustee shall hold and retain said life insurance policies and all other insurance policies on

the life of said Settlor which may at any time be held as a part of the capital or principal of said Trust, and collect and receive any sums which may become due and payable thereon during the life of said Settlor and collect and receive the proceeds thereof when and as the same may become due and payable, either by reason of the death of said Settlor or by reason of the maturity of the endowment in any of said policies which may be endowment policies, and hold, retain, manage, and control said proceeds as a part of the capital or principal of said Trusts, and hold, retain, manage, and control all investments, securities, real estate, and property which may from time to time and at any time comprise a part of the capital or principal of said Trust, and invest, reinvest, and keep invested all moneys which may from time to time and at any time comprise a part of the capital or principal of said Trust, and collect and receive the interest, rents, income, dividends, issues, and profits which may at any time become payable on account of the investments, securities, real estate, and property comprising the capital or principal of said Trust, and after paying out of said income all lawful costs, charges, taxes, commissions, and expenses incident to the care and management of said Trust, said Trustee shall pay, expend, use, and apply the net income and hold and pay over the capital or principal of said Trust, as follows, to wit:

a. During the lifetime of said Settlor said Trustee shall expend, use, and apply as much of said net income as may be necessary to pay all premiums which may from time to time become due and payable on account of all insurance policies on the life of said Settlor at any time forming a part of the capital or principal of the Trust created by this Deed. If the net income in the hands of said Trustee should at any time be insufficient to pay any or all such premiums in full on the respective due dates thereof named in said insurance policies, and if said Settlor should not pay to said Trustee as hereinafter provided such sum or sums of money as may be necessary to enable said Trustee to pay all such premiums in full on the respective due dates thereof named in said insurance policies, then and in such case said Trustee shall have the right and is hereby fully authorized and empowered either (1) to borrow upon any of said insurance policies on the life of said Settlor, or upon any one or more of the securities constituting a part of the capital or principal of said Trust, such sum or sums of money as may be necessary to enable said Trustee to pay all of the above-mentioned premiums in full before the expiration of the grace period mentioned or provided for in said policies, or (2) to surrender any or all of said policies of insurance on the life of said Settlor and collect the

cash surrender values thereof and add said cash surrender values to the capital or principal of said Trust, whichever course of action in the opinion of said Trustee, in the exercise of its sole and unrestricted judgment, may seem most advantageous to said Trust.

NOTE: Provisions for the payment of the net income and for the subsequent disposal of the principal vary with each particular case and of course are adapted to meet the desire of the Settlor.

THIRD. Dividends on Life Insurance Policies: Said Trustee shall have full power and authority to apply any dividends or shares of surplus which may become payable on account of the life insurance policies aforesaid, in part payment or abatement of any premiums which may become payable on account of said policies, or said Trustee may in its discretion collect in cash all dividends or shares of surplus aforesaid, provided, however, that all dividends or shares of surplus which may be so collected in cash shall form part of the general income of said Trust and shall be paid, applied, and distributed by said Trustee as such.

FOURTH. Provision for Protection of Beneficiaries: It is hereby expressly declared that so far as may be permissible in law all shares of principal and income by this Deed given to or directed to be held for the use and benefit of the several and respective beneficiaries mentioned or set out in the Trust declared by this Deed, shall not be in any way or manner subject or liable to their or any of their anticipation, sale, pledge, debts, contracts, engagements, or liabilities, and shall not be subject or liable to attachment or sequestration under any legal or equitable or other process.

FIFTH. Right to Add to Trust: At any time during the continuance of the Trust by this Deed created said Settlor shall have the right to pay, assign, transfer, set over, and deliver unto said Trustee such additional sum or sums of money, investments, securities, insurance policies on his life, real estate, and property, as he may wish, whereupon such sum or sums of money, investments, securities, life insurance policies, real estate, and property shall be held, retained, invested, and managed by said Trustee under the terms of this Deed as part of the capital of the Trust by this Deed created, in the same manner and upon the same uses and trusts and with the same and like force and effect as if such moneys, investments, securities, life insurance policies, real estate, and property had originally constituted a part of the capital or principal of said Trust; and in addition thereto said Settlor shall have the right to pay to said Trustee such sum or sums of money as may from time to time be necessary to enable said Trustee to

pay in full the premiums which may from time to time become due and payable on account of all insurance policies on the life of said Settlor at any time forming a part of the capital or principal of the Trust created by this Deed.

SIXTH. Powers Conferred upon Trustee: The following powers and authorities are hereby conferred upon said Trustee, to wit:

a. To hold and retain the stocks, bonds, and all other investments, securities, real estate, and property which may at any time comprise the capital or principal of said Trust, for any length of time said Trustee may deem expedient or advantageous so to do, without liability of any kind by reason of such holding or retention

b. To invest, reinvest, and keep invested the capital or principal of said Trust, in such securities as said Trustee may deem prudent, without restriction to so-called legal investments for Trustees, and with power and authority to purchase investments and securities as aforesaid at a premium and to deduct such premium from income; also to purchase investments and securities as aforesaid at a discount and to credit such discount to principal

c. To purchase from the Executor of the Will of said Settlor or the Administrator of his estate, as investments of any Trust hereunder, any of the securities or property which may constitute his estate, at such price or prices as to said Trustee under this Deed may seem best; and to loan to the Executor of the Will of said Settlor or the administrator of his estate, such sum or sums of money as said Trustee may think best, taking as collateral security therefor any of the investments or securities which may constitute part of his estate

d. To make subscriptions for stock and bond privileges and allotments to such extent as said Trustee may deem proper, in companies in which said Trust may from time to time have an interest, and to surrender or deposit shares of stock and bonds from time to time belonging to said Trust, for the purpose of taking part in any foreclosure, merger, or reorganization proceedings, and in the discretion of said Trustee to pay assessments in connection therewith

e. To sell and dispose of all or any part of the investments, securities, real estate, and property which may from time to time or at any time comprise the capital or principal of said Trust, either at public or private sale, for such prices and on such terms as to said Trustee may seem fit and proper, and to make, execute, and deliver to the purchasers thereof good and sufficient deeds of conveyance therefor and all assignments, transfers, and other legal

instruments either necessary or convenient for passing the title and ownership thereto, free and discharged of all trusts, without liability on the part of such purchasers to see to the application of the purchase money

f. To treat as principal and not as income for the purpose of said Trust, all stock dividends or proceeds of sales of rights to subscribe for stock issued with respect to any stock which may from time to time be held by said Trustee as part of said Trust.

SEVENTH. Revocation: The right is hereby reserved unto said Settlor, by any proper instrument or instruments in writing, duly executed under his hand and seal, at any time hereafter, to revoke, alter, vary, annul, and change this Deed and all or any of the uses and trusts and powers therein declared or which may hereafter be declared, and to limit and declare new uses and trusts, and to confer upon the Trustee named in this Deed other or additional powers, and to lodge such instrument or instruments with said Trustee, whereupon the capital or principal of the Trust created by this Deed shall thereafter be held by said Trustee subject to such new uses and trusts and with such other and additional powers; provided, however, that if this Deed and the uses and trusts thereunder shall have been revoked or annulled by said Settlor, either in whole or in part, then and in such case said Trustee shall thereupon assign, transfer, convey, and set over unto said Settlor, all right, title, interest, and ownership which said Trustee may have acquired in and to the whole of the trust estate or that part thereof to which such instrument or instruments of revocation and annulment may relate, so that the same shall thereafter be held, possessed, and enjoyed by said Settlor absolutely free, clear, and discharged of and from all the trusts or limitations and of and from all the terms and provisions of this Deed.

ALTERNATIVE CLAUSE. (Irrevocable): Settlor hereby declares that he has been fully advised as to the legal effect of the execution of this Deed of Trust, and that he has given full consideration to the question whether the trust hereby created shall be revocable or irrevocable, and he hereby declares the same to be irrevocable and that it shall stand without power in him at any time to revoke, change, or annul any of the provisions herein contained.

EIGHTH. Taxes: If any estate tax, inheritance tax, succession tax, transfer tax, or any other tax in the nature of any thereof, should become payable upon the interests or estates of any of the beneficiaries of said Trust, then and in such case all taxes as aforesaid shall be paid out of the capital or principal of the Trust by this Deed created, so that said interests or estates shall be free and clear of all taxes as aforesaid.

IN WITNESS WHEREOF, Said Settlor has hereunto set his hand and seal, and the said Trustee has hereunto caused to be affixed its common or corporate seal, duly attested, all in duplicate, the day and year first hereinabove written.

Signed, Sealed, and Delivered by : .....
..... in the :
presence of us :
..... :
..... :
:
.....(SEAL)

Sealed and Delivered by : INSTITUTE TRUST COMPANY
Institute Trust Company, : By
in the presence of us : .....
..... : President
..... : Attest
.....

Exhibit A mentioned in and intended to be taken and considered as part of the foregoing Deed made by ..... to Institute Trust Company of Philadelphia, dated the ..... day of ..... A. D. 1926, in the same manner and with the same effect as if this Exhibit were incorporated in the body of said Deed:

NOTE: Securities, real estate, and policies to be listed here.
Above approved:

.....
Settlor

NOTE: Appropriate Certificates of Acknowledgment by Settlor and Trustee to be added

SPECIAL TYPES OF LIVING TRUSTS.—There are, however, a number of special kinds of living trusts as to which a few words would not be amiss. One is the so-called community trust, a more or less modern development, whereby it is provided that any one may add to the trust at any time, said funds so contributed to be administered in perpetuity, usually by a corporate fiduciary as trustee, for

some great public purpose or purposes, *i. e.*, for maintenance of hospitals or schools, for the furtherance of scientific research, or the like. Several such community trusts exist in Cleveland, New York, Philadelphia, and thirty or forty other cities and are performing a commendable public work. Mention might also be made of special trusts for some peculiar charity or public institution or other public purpose; for example, such trusts as are administered by the Board of City Trusts in Philadelphia, which has in its charge the various trust funds, from time to time given to the City of Philadelphia, for certain specific purposes, the best known of which are the fund given by Stephen Girard for the education of poor boys and the Ridgway fund to maintain a library. In many other cities similar trusts exist.

In fact, trusts may be created, as has already been stated, for any lawful purpose, and these purposes are as varied as the whims and desires of men.

REFERENCES ON VARIOUS PHASES OF TAXATION.—The question of taxation with respect to the income and principal of living trusts, especially regarding funded and unfunded insurance trusts, is a very complex and intricate one which cannot well be discussed intelligently within the limitations of this text. The student is referred to Chapter VIII, dealing with taxation generally, to Stephenson's work on Living Trusts, already referred to, to Conyngton on Wills, Estates, and Trusts, and to the several tax services and textbooks on the subject; in addition, he should consult the

laws and decisions of the particular state in which he resides.

VARIATIONS IN JURISDICTION OVER LIVING TRUSTS.—As the questions of the accounting, auditing, and settlement of trusts and of the distribution thereof have already been considered, in connection with trusts under wills, and so forth, in Chapter V, no further comment will be made except to say that, in some states, living trusts are under the jurisdiction of the same courts which supervise trusts under wills, whereas, in other states, the two kinds of trusts come under the jurisdiction of separate courts. The student should familiarize himself with the laws and practice of his own state.

The following is inserted at this point merely to illustrate the text and to give the student a concrete idea of the form of a trust deed not relating to life insurance:

(Form of Trust Deed)

LIVING TRUST

THIS DEED OF TRUST Made this .....day of ..... A. D. 1926, Between ..... (hereinafter called Settlor), of the one part, and INSTITUTE TRUST COMPANY (hereinafter called Trustee), of the other part, WITNESSETH:

FIRST. Creation of Trust: That for and in consideration of the sum of One Dollar unto said Settlor in hand paid by said Trustee at the execution and delivery hereof, the receipt whereof is hereby acknowledged, and for the purpose of settling and securing the moneys, investments, securities, real estate, and property hereinafter mentioned, upon the uses and trusts herein limited and declared, said Settlor has granted, bargained, sold, assigned, transferred, and set over, and does hereby grant, bargain, sell, assign, transfer, and set over unto said Trustee, its Successors, and Assigns, all moneys, investments, securities, real estate, and property (the receipt whereof is hereby acknowledged) set out and

described in a certain Schedule hereunto appended, marked Exhibit A, to be deemed and taken as part of this Deed with the same and like force and effect as if the full contents thereof were incorporated herein, which said moneys, investments, securities, real estate, and property, together with all other moneys, investments, securities, real estate, and property of every kind or nature which may at any time under the terms of this Deed constitute the capital of the Trust by this Deed created, shall be held by said Trustee upon the following uses and trusts, to wit:

SECOND. Terms of the Trust: Said Trustee shall manage and control all moneys, investments, securities, real estate, and property which may from time to time and at any time comprise the capital or principal of said Trust, and collect and receive the interest, rents, income, dividends, issues, and profits thereof and accretions thereto, and collect and receive the capital thereof, and invest, reinvest, and keep invested the capital or principal of said Trust, in the manner and with the powers and authorities hereinafter fully set forth, and after paying out of said income all lawful costs, charges, taxes, commissions, and expenses incident to the care and management of said Trust, said Trustee shall pay the net income and hold, pay over, transfer, and distribute the capital or principal of said Trust, as follows, to wit:

NOTE: Provisions for the payment of the net income and for the subsequent disposal of the principal vary with each particular case and of course are adapted to meet the desire of the Settlor.

THIRD. Provision for Protection of Beneficiaries: It is hereby expressly declared that all shares of principal and income by this Deed given to or directed to be held for the use and benefit of the several and respective beneficiaries mentioned or set out in the Trust declared by this Deed, shall not be in any way or manner subject or liable to their or any of their anticipation, sale, pledge, debts, contracts, engagements, or liabilities, and shall not be subject or liable to attachment or sequestration under any legal or equitable or other process:

FOURTH. Right to Add to Trust: At any time during the continuance of the Trust by this Deed created said Settlor shall have the right to pay, assign, transfer, convey, set over, and deliver unto said Trustee such additional sum or sums of money, investments, securities, real estate, and property as he may wish, whereupon such sum or sums of money, investments, securities, real estate, and property shall be held, retained, invested, and managed by said Trustee under the terms of this Deed as part of the capital of the Trust by this Deed created,

in the same manner and upon the same uses and trusts, and with the same and like full force and effect as if such moneys, investments, securities, real estate, and property had originally constituted a part of the capital or principal of said Trust.

FIFTH. Powers Conferred upon Trustee: The following powers and authorities are hereby conferred upon said Trustee, to wit:

a. To hold and retain the stocks, bonds, and all other investments, securities, real estate, and property which may at any time comprise the capital or principal of said Trust, for any length of time said Trustee may deem expedient or advantageous so to do, without liability of any kind by reason of such holding or retention.

b. To invest, reinvest, and keep invested the capital or principal of said Trust, in such securities as said Trustee may deem prudent, without restriction to so-called legal investments for Trustees, and with power and authority to purchase investments and securities as aforesaid at a premium and to deduct such premiums from income, also to purchase investments and securities as aforesaid at a discount, and to credit such discount to principal.

c. To make subscriptions for stock and bond privileges and allotments to such extent as said Trustee may deem proper, in companies in which said Trust may from time to time have an interest, and to surrender or deposit shares of stock and bonds from time to time belonging to said Trust, for the purpose of taking part in any foreclosure, merger, or reorganization proceedings, and in the discretion of said Trustee to pay assessments in connection therewith.

d. To sell and dispose of all or any part of the investments, securities, real estate, and property which may from time to time or at any time comprise the capital or principal of said Trust, either at public or private sale, for such prices and on such terms as to said Trustee may seem fit and proper, and to make, execute, and deliver to the purchasers thereof good and sufficient deeds of conveyance therefor and all assignments, transfers, and other legal instruments either necessary or convenient for passing the title and ownership thereto, free and discharged of all trusts, without liability on the part of such purchasers to see to the application of the purchase money.

e. To treat as principal and not as income for the purpose of said Trust, all stock dividends or proceeds of sales of rights to subscribe for stock issued with respect to any stock which may from time to time be held by said Trustee as part of said Trust.

SIXTH. Revocation: The right is hereby reserved unto said Settlor by any proper instrument or instruments in writing, duly executed

under his hand and seal, at any time hereafter to revoke, alter, vary, annul, and change this Deed and all or any of the uses and trusts and powers therein declared or which may hereafter be declared, and to limit and declare new uses and trusts, and to confer upon the Trustee named in this Deed other or additional powers, and to lodge such instrument or instruments with said Trustee, whereupon the capital or principal of the Trust created by this Deed shall thereafter be held by said Trustee subject to such new uses and trusts and with such other and additional powers; provided, however, that if this Deed and the uses and trusts thereunder shall have been revoked or annulled by said Settlor, either in whole or in part, then and in such case said Trustee shall thereupon assign, transfer, convey, and set over unto said Settlor, all right, title, interest, and ownership which said Trustee may have acquired in and to the whole of the Trust Estate or that part thereof to which such instrument or instruments of revocation and annulment may relate, so that the same shall thereafter be held, possessed, and enjoyed by said Settlor absolutely, free, clear, and discharged of and from all the trusts or limitations and of and from all the terms and provisions of this Deed.

ALTERNATIVE CLAUSE. (Irrevocable): Settlor hereby declares that he has been fully advised as to the legal effect of the execution of this Deed of Trust, and that he has given full consideration to the question whether the trust hereby created shall be revocable or irrevocable, and he hereby declares the same to be irrevocable and that it shall stand without power in him at any time to revoke, change, or annul any of the provisions herein contained.

IN WITNESS WHEREOF, Said Settlor has hereunto set his hand and seal, and the said Trustee has hereunto caused to be affixed its common or corporate seal, duly attested, all in duplicate, the day and year first hereinabove written.

Signed, Sealed, and Delivered :
by ..... :
in the presence of us :
..... :
..... :

.....(SEAL)

Sealed and Delivered by Institute Trust Company in the presence of us :
..... :
..... :

INSTITUTE TRUST COMPANY
By

President

Attest:

.....

Exhibit A mentioned in and intended to be taken and considered as part of the foregoing Deed made by ..... to Institute Trust Company, dated the ..... day of ..... A. D. 1926, in the same manner and with the same effect as if this Exhibit were incorporated in the body of said Deed:

NOTE: Securities, real estate, and so forth, to be listed here.
Above approved:

.....
Settlor

NOTE: Appropriate Certificates of Acknowledgment by the Settlor and Trustee, to be added

CHAPTER XI

Agency Accounts and Escrows

THERE are several other matters affecting property of individuals, as to which corporate fiduciaries function helpfully; they relate to functions which may also be performed by individuals. "Agency accounts" is a very general term and includes any case in which one is acting for another. It includes, for instance, the so-called "custody or safekeeping accounts." All of these accounts may be designated as trusts in the broad acceptation of the term, in that they involve the indulgence of trust in the agent, although (strictly speaking) they should not be so designated.

AGENCY, CUSTODY, AND SAFEKEEPING ACCOUNTS ARE NOT STRICTLY TRUSTS.—In the case of trusts, the legal title to the trust property is in the trustee, whereas the equitable title is in the beneficiary; in matters of agency, the legal title to the property entrusted to the agent always remains in the owner or the appointor of the agent, and the agent is merely, as one person has aptly phrased it, "the manual hand of the appointor moving at his direction."

LETTER OF ATTORNEY.—If the agent is appointed by a writing, under seal, in the usual form, the agent is called the attorney-in-fact of the appointor or constituent, and his powers and duties are, or should be, fully set forth in the letter or power

of attorney. The following may be considered as a more or less typical form of letter of attorney, covering the average case in which a corporate fiduciary is called upon to act, *viz:*

(Form of Letter of Attorney)

KNOW ALL MEN BY THESE PRESENTS, That I, WILLIAM BROWN, do make, constitute, and appoint INSTITUTE TRUST COMPANY my true and lawful attorney for me and in my name to do and perform the following acts, matters, and things:

FIRST. To ask, demand, collect, sue for, recover, and receive all principal, interest, issues, dividends, distributive shares, and, generally, all amounts represented by or due or demandable under the terms of all bonds, coupons, certificates, or shares of stock, notes, mortgages, trust deeds, fire insurance policies, and investments and securities of every kind and nature which I may at any time own; and to give good and sufficient receipts, discharges, and acquittances therefor; and to enter or cause to be entered satisfaction of record of all mortgages which I may at any time own; and to release of record all trust deeds which I may at any time own; and to release, assign, and deliver all fire insurance policies and title insurance policies which may accompany such mortgages or trust deeds.

SECOND. To suggest or submit to me such investments as my said attorney may, from time to time, consider suitable for investment of such principal money as may be, from time to time, uninvested in the care and custody of my said attorney, hereby exonerating my said attorney from all responsibility or liability of any kind or nature for the value or safety of any investments which my said attorney may suggest, as aforesaid; and to invest, reinvest, and keep invested all principal moneys which may be at any time uninvested in the care and custody of my said attorney, in such securities as I may, from time to time, by writing lodged with my said attorney, order and direct.

THIRD. To let and demise any real estate and premises which I may, at any time, own, for such rent and on such terms and for such time or times as my said attorney may think proper; and to collect and receive all rents due and to grow due thereon; and to have, use, possess, and take all lawful means for the collection of all rents and for the recovery of possession of any real estate and premises which may be let or demised, as aforesaid, either by distraint or suit or otherwise

howsoever; and to keep said real estate and premises in such tenantable repair as to my said attorney may seem reasonable and proper; and to pay out of said rents the taxes, water rent, repairs, charges, and all expenses of every kind or nature proper to be paid out of said rents so to be collected.

FOURTH. (For insertion of special powers and authorities.)

FIFTH. I give and grant unto my said attorney full and ample power and authority, one or more attorney or attorneys under it to make and substitute, from time to time, in or concerning the premises or any part thereof, hereby ratifying and confirming whatsoever my said attorney or its substitute or substitutes duly constituted, as aforesaid, shall or may do in the premises by virtue of these presents.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this Fifth day of February, in the year of our Lord One Thousand Nine Hundred and Twenty-seven (1927).

Signed, Sealed and Delivered :
in the presence of us : WILLIAM BROWN (SEAL)
JOHN DOE :
SAMUEL SMITH :

NOTE: This letter of attorney may be acknowledged; and while it is advisable to do so, it is not essential unless power to convey or otherwise dispose of real estate or some interest therein is included.

Such letter of attorney may, of course, be made more restrictive or be expanded indefinitely, as the circumstances of the case may require. Ordinary agency accounts, generally speaking, are created by more informal writings, or sometimes orally, by general consent and practice. Safekeeping or custody or depositary accounts relate to the accounts in which securities are placed in the care of an agent or in his custody or are deposited with him; no particular duty is to be performed relative to them, except perhaps cutting and collecting coupons and remitting the proceeds thereof, collecting bonds or notes at maturity and remitting the proceeds, and

keeping securities safely for a period or retaining custody thereof pending further instructions.

ORIGIN OF SAFEKEEPING SERVICE.—Generally speaking, this so-called safekeeping service had its origin when the customers of banks and trust companies began leaving with them securities which had been purchased from such companies or which had been held as collateral to loans. Usually, such securities received due care but no special attention from the bank, and delivery was made when requested by the owner, or coupons were clipped as above indicated and delivered to the customer or owner when requested by him. The service was more and more extended as time went on and developed quite rapidly at the time of the issue of liberty loans, when many people had no safe deposit boxes or did not care to rent them. Trust companies and banks were called on and, prompted by patriotic motives, consented to act as custodians without compensation. The practice has become more or less a fixture in trust department work. In addition to the above, the sort of service being discussed was also made available when banks in the larger cities received shipments of securities from their correspondents, so that, in case of sale, delivery might be made promptly or, if a loan were desired, collateral would be immediately available. In some cases, the bank in the reserve city held short time commercial paper purchased for correspondents to avoid the expense and risk of frequent shipments. Individual borrowers found it convenient to have securi-

ties with their respective banks in order that, while absent, loans might be quickly arranged or in order that they might be saved a trip to the safe deposit box. Many other instances of agencies and forms of safekeeping accounts might be mentioned, but it hardly seems necessary to do so.

THE AGENT'S PART IN RECORDING AND CHECKING SECURITIES.—The necessity of keeping careful records, checks, and counterchecks on securities received is, of course, very apparent, and many companies have devised most elaborate systems. As a part of the work of the agent, statements in detail are rendered, either annually or oftener; they show total income received, the sources, whether tax was paid at the source or withheld, together with other valuable information—all of which is helpful to the principal in making up his income tax return and for other purposes. This procedure is also necessary with respect to depositary accounts, which will be considered more fully in another chapter, as will also other forms of corporate agencies.

ACCOUNTABILITY, LIABILITY, AND COMPENSATION OF AGENTS.—Agents or attorneys-in-fact are accountable only to their respective principals and are not required to present an account of their administration of the property in their care to any court, unless, in the event of disagreement or litigation, such a course should become necessary. The fees of agents are varied indeed, and there is very little uniformity in the practice

with respect thereto. When specific duties, apt to extend over a long period, are performed, a fee of a certain per cent upon income collected and disbursed is charged; there is a possible additional fee for investments made or upon distribution or return of the property entrusted to the care of the agent. As a general rule, if the agent acts strictly in accordance with the instructions of his principal, no liability exists if a loss should occur by reason thereof; nor, if the agent acts in all matters with due care and diligence and is not guilty of negligence, will he be held liable in the event of a loss suffered by his principal in the course of the agent's handling of his principal's property. When considering the measure of liability, it would be well to consider the distinction between cases in which the trustee receives a fee for his services and those in which he renders such services without charge. When acting as custodian of securities, the trustee is considered a bailee; if he receives a fee or compensation, he is called a "bailee for hire," otherwise, a "gratuitous bailee." In some cases, a trustee may be considered as a bailee for hire even though he may have made no direct charge for his services. A number of banks have been sued for the value of liberty bonds that were stolen and have set up the defense that, as they received no monetary remuneration and were therefore gratuitous bailees and had given the securities ordinary care, there was no liability. In a number of cases, such defenses were denied by the courts of last resort, on the ground that deposits of

securities had been solicited by the banks, that in rendering this service the banks expected to be favored with other business of the depositor, and that because they were indirectly compensated they should therefore be held to a high degree of care and not to ordinary care.

It has been further held that a gratuitous bailee must give the same care to the bailed (or deposited) property that it gives to its own property of similar character and that the keeping of the securities of the bank in a steel chest, while those of the customers were merely placed in a cabinet in the vault, might constitute negligence on the part of the bank. (See Kubli v. Bank, 186 N. W. 421 [Iowa]; Banking Law Journal, April 1922, page 237; Trustees and so forth v. Trust Co., 109 S. E. 6 [North Carolina]; Banking Law Journal 1922, page 7; Hill v. Bank, 123 S. E. 417 [West Virginia]; Banking Law Journal, August 1924, page 557.)

> The bank having accepted funds for the purchase of bonds, it was responsible to the subscriber, either for the return of the money or for the delivery of bonds designated in the subscription contract.
>
> DEPOSIT OF BONDS FOR SAFEKEEPING
>
> The bank placed the bonds in an iron safe but not in a burglar proof part of that safe. The iron safe was blown open and the bonds stolen. Held: that it was a question for the jury whether appellant was grossly negligent, although the bank was a gratuitous bailee. (Merchants Bank v. Affholter, 140 Ark. 480.)

SPECIAL SERVICES RENDERED IN CUSTODY OF SECURITIES.—In cases of custody of securities, it is the practice to give carefully prepared and specific receipts and to obtain not only dividend

orders, wherever stocks are concerned, and instructions regarding ownership certificates, to be used for income tax purposes, but also directions for the disposition of income and principal collected. Such a receipt and copies of instructions, when found among the effects of the depositor in the event of his death, are of material help to his legal representative.

In acting as above indicated, the practice has grown among banks and trust companies to advise customers, in advance, of maturities and calls, of expiration of conversion privileges, of rights to subscribe to additional stocks or bonds, and of defaults. In some cases, advices of such marked changes in conditions of corporations, whose securities are held, as might affect the values, are often given to the customer.

If negotiable notes or other instruments, on which there are indorsers or other parties secondarily liable, constitute the securities so deposited, it is the duty of the custodian or agent to make due presentment for payment at maturity and to give, by protest or otherwise, proper notice of non-payment in order to preserve the rights against such parties; if, through failure to make due presentment, parties secondarily liable are discharged and a loss is suffered, the agent will probably be held liable for his negligence in permitting such a condition.

BUSINESS ADVANTAGES OF FIDUCIARY RELATIONSHIP.—This form of service has been a source of much business for trust organizations be-

cause it appeals not only to persons who are absent on business or pleasure but also to fraternal, charitable, and similar organizations. Income of absentees is collected promptly and made available or deposited; maturing or called securities are cashed. In some cases, securities may be in a safe deposit box subject to joint control, and it may be inconvenient for the several persons concerned always to be present at the same time to open the box. If such securities are held in an agency account, a joint order is sufficient to withdraw them; the income may be collected when due, without waiting for the interested parties to find a convenient time to meet and clip coupons. Again, in the event that fiduciaries are under bond and a surety company is involved and has joint control of the securities and money of the trust, under court order, such securities may be left with a trust department subject to the control of the fiduciary and the surety company; the inconvenience of personal visits to the box is thus eliminated. These services often lead to the formation of more permanent trust relationships—the creation of living trusts or appointments as executors and trustees under wills. It therefore behooves the bank or trust company so to serve its customers and keep them informed regarding their securities that they will be induced to continue, for those succeeding to their property, the fiduciary relationship thus begun and enjoyed. This service may also involve keeping available for customers security rating books and financial services of all

kinds, and it may mean keeping the customers promptly advised, in order that they may take advantage of the information furnished.

Escrows

DEFINITION OF TRUE ESCROW AS DISTINGUISHED FROM ACCEPTED USE OF TERM.—Our next consideration relates to still another function of trust companies or departments, *i. e.*, acting as escrow agent. An escrow may be defined, generally, as a deposit of a written instrument with a person, not a party to the instrument, for delivery either on the performance of a condition or on the happening of an event. This may be considered as a definition of a true escrow, but the term has been extended to include the conditional deposit of anything. An escrow has also been defined as follows: "An escrow is the deposit with a stakeholder of cash, securities, title papers, or other property, in regard to which two or more parties may have conflicting interest." (See Page and Gates, Work of Corporate Trust Departments, 1926.)

CASES IN WHICH GRANTOR'S CONTROL CEASES.—There are cases of escrows in which the depositor parts with all control over the thing deposited, such as a deed to be delivered to the grantee on the death of the grantor. The better opinion seems to be that, in order that such transfer shall be effective, the deed must have been delivered beyond the control of the grantor. (See Phelps v. Pratt, 225 Ill. 85; 80 N. E. 69; 9 L. R. A. [N. S.] 945.) As

an illustration, it was held in a certain case (Ashley v. Ashley, 93 Ark. 324), that deeds and bills of sale, executed by one to his heirs, in anticipation of death, and delivered to one of the grantees to be placed in a chest of the grantor—to be delivered at the grantor's death, but subject to his dominion as long as he lived—were ineffective to pass title at his death.

THE CHANGING SCOPE OF ESCROW AGENT'S ACCOUNTABILITY.—The escrow agent is the agent of all parties to the transaction until the performance of the condition or the happening of the event, after which such escrow agent becomes the agent of the person to whom delivery is to be made. One who acts in escrow with either party, without the consent of the other, does so at his peril. (See Citizen's Bank, and so forth v. Devison, 229 U. S. 212.) It is the duty of the escrow holder to keep the item safely deposited for the benefit of both parties, so that it may be returned in case of non-performance or delivered in the event of performance. Should there be an improper delivery, the escrow agent will be liable to the party suffering loss by reason of the improper delivery.

IMPORTANCE OF THE TIME ELEMENT.—If the escrow agreement sets no specific time for performance by the person to whom delivery is to be made, the condition must be performed within a reasonable time. If a time for performance is fixed and time is made of the essence of the agreement, the person to whom delivery is to be made loses all

rights if he fails to perform within the time fixed.

WORDING OF CONDITIONS IMPORTANT TO THE VALIDITY OF THE INSTRUMENT.—It is important that the terms of the escrow agreement be set forth in such clear phraseology as to be understood by all of the parties; the escrow agent should be especially particular to see that there are no ambiguities or possibilities of misunderstandings. The condition of the performance should be specific and should be readily ascertainable, and the escrow agent should not be obliged to assume the duty of deciding technical questions, nor should he in any way act as a judge or an umpire in determining what may constitute a performance or non-performance. A trust company, bank, or individual acting as escrow agent should be certain that the escrow has ripened, because an instrument taken from escrow before the conditions happen or the time expires is of no validity. (Ford v. Moody, 169 Ark. 649.)

In some escrows a joint order may be obtained, that is, it may be provided that the item deposited is to be delivered on the joint order of certain parties.

PAYMENT OF CHARGES.—The escrow agreement should further provide that the parties agree to pay the escrow charges, and the agent should be given a lien on the deposit for such charges and for expenses incurred by reason of acting as such. In some cases, fees—usually a fixed sum—are paid in advance. Ordinarily, if no lien is retained by the agreement, in the absence of a special statute, the escrow agent is not justified in

holding the deposited items but must resort to an action at law for recovery of its charges. Attorneys' fees should be included in case of any action by or against the escrow agent; if this provision is not made, the agent can look only for its usual fee.

SUMMARY OF CONDITIONS TO BE CONSIDERED BY AN ESCROW AGENT.—As a summary, it should be remembered that an escrow should not be accepted on any conditions other than those which are subject to an agreement or careful letter of instructions; that such agreement should be complete in itself; that it should be signed by all the parties in interest; that it should fully, clearly, and concisely set forth the duties of the escrow agent, under every conceivable contingency, with respect to the escrow; and that it should also clearly state the conditions of the delivery or surrender thereof either upon the fulfilment of the conditions of the escrow, or in the event of any default in the performance thereof, or in the event of the abrogation of the escrow agreement by all the parties in interest, after due notice to the escrow agent.

USUAL PURPOSES OF ESCROW AGREEMENTS.—Escrow agreements are entered into for many and varied purposes, but perhaps the most usual purpose relates to the sale of real estate. Such cases usually occur when an agreement of sale has been entered into. In these cases, the purchaser should have an opportunity to examine the title, make searches, and so forth; and, on the other hand, the seller might like to be assured of the payment

of the purchase money. In addition, the seller might require that the purchaser place the purchase money in escrow with a disinterested person or party, to be paid to the seller when it is legally demonstrated that he can give a good title; and the purchaser, on the other hand, might require that a duly executed and acknowledged deed be deposited in escrow by the seller, to be delivered when the purchaser is properly satisfied that the seller can convey a good title. In some parts of the country, notably in the West—California, Washington, and other states—the escrow business has been very highly developed and is quite profitable. In other states, escrows are considered as merely incidental business and are not so profitable. The fees vary with the work done and the value of the property involved. Usually a flat minimum fee is charged subject to increase if the amount involved exceeds certain varying figures.

The following is given as a very simple form of escrow instruction or letter:

(Form of Escrow Instruction)

Institute Trust Company
Ledger Building
Philadelphia

Sirs:

The undersigned hereby deliver to you the deed between them dated May 2, 1927, fcr two lots in Atlantic City, New Jersey, which is to be delivered by you to John Doe, on June 1, 1927, but only in accordance with the following instructions:

a. That upon your applying for and obtaining a report upon the title of Richard Roe to said property, you find he has a good and marketable title in fee simple, clear of all incumbrances;

b. That you receive from John Doe the sum of One Thousand Dollars in cash and pay the same over to said Richard Roe; if, however, the report of title as aforesaid should show that Richard Roe has not a good and marketable title or if the said John Doe shall not make payment as aforesaid, you are instructed to return said deed to Richard Roe. Your responsibility shall be limited to the faithful performance of the instructions above given, for which performance we hereby agree to pay you the sum of Fifty Dollars, and in addition thereto to reimburse you for all expenses you may have incurred in connection therewith.

RICHARD ROE
JOHN DOE

PRIMARY ESSENTIALS OF A GOOD ESCROW.—The above form clearly illustrates the four primary essentials of a good escrow, which are as follows:

1. Parties capable of acting
2. A subject matter
3. Delivery of property or evidence of property to escrow agent
4. Clear instructions

In this case we have the absolute essential to a proper escrow in the delivery of a deed to a stranger or third person, the trust company or bank. This deed is delivered to and is to be held by the company or escrow agent until June 1, 1927, on which date the company is directed to—and must—deliver the deed to John Doe; but only, however, if two things have happened, *viz:*

a. The obtaining of a report showing the title in Richard Roe to be a good and marketable title in fee simple, clear of all incumbrances; and

b. The receiving from John Doe of the sum of

one thousand dollars in *cash,* not in notes or checks or other forms of obligations.

SURRENDER OF DEED IN CASE OF DEFAULT AND RIGHTS IN CASE OF DEATH.—If the report of title is adverse in any particular or if John Doe does not pay the one thousand dollars, in cash or, as is held in some cases, the equivalent thereof, the escrow agent must immediately return the deed to Richard Roe. The escrow agent is not in any sense liable for the non-performance of any agreement as between the parties themselves; that problem is left for them to work out. Should Richard Roe die, pending the performance of the condition within the time stated, his rights would vest in his executors or administrators, as his right was to receive purchase money; on the other hand, if John Doe were to die before June 1, 1927, his rights would vest in his devisee or heir-at-law because his right was to receive a conveyance of real estate.

The forms of escrow instructions or agreements are varied indeed. They may relate to real estate or to personal property of almost any kind and description and may vary from a simple letter of instructions, as above illustrated, to a most complex agreement dealing with a stock transaction.

AN ESCROW IS NEITHER A TRUST NOR AN AGENCY.—Keeping clearly in mind several distinctions between escrows and trusts or agencies will help much in the understanding of them and of their operation. An escrow is not a trust, for the title remains in either one or the other of the

parties making the deposit; it never rests in the escrow agent. It is not an agency, for the escrow agent, so-called, may take no orders from either party; his duties are set forth in the escrow agreement or letter of instructions. No change may be made therein except by the united action of the depositors. An escrow agent, in short, is merely a stakeholder.

The practice differs regarding escrows in different states; it is a more extensive activity in some than in others. For example, there is the so-called "seven-day escrow" which seems to be peculiar to California and usually relates to the sale of a particular kind of business, such as a grocery, barber shop, or the like. It is, as a rule, entered into, according to the laws of that state, to provide for the recording of the notice of the intended sale.

BUSINESS DETAILS TO BE CAREFULLY OBSERVED.—It is the practice of some trust organizations, when acting as escrow agents, to issue receipts to the persons depositing property, deeds, and the like; the receipts are properly so earmarked by number or otherwise, as to identify them with the agreement or letter of instructions. In addition, good practice also demands that careful records be kept of the entire transaction; such as the original entries when the escrow is first received, records of subsequent payments if any are required, of notices to be given, and of things to be done; also, records of the final delivery and closing of the escrow. Proper receipts should be obtained from

the persons or parties to whom the final deliveries or payments are made. As the duties of an escrow agent are fixed and as great liability follows the failure to perform accordingly, care should be taken to see that no act is omitted, that there is no variation from instructions, and that most careful and precise records are kept.

While escrow business, in a great many institutions, is not looked upon as a source of profitable business, it may nevertheless prove to be quite a feeder for more lucrative business by reason of the contacts made.

TWO VALUABLE REFERENCES ON ESCROWS.—The subject of escrows has been discussed in an article by Fred F. Van Liew, formerly of the Old National Bank of Spokane. The article will be found in both the Bulletin of the American Institute of Banking for April 1923 and in Trust Companies for January 1923. The subject was also very fully presented and discussed by John C. Campbell, formerly superintendent of escrows of the Pacific Southwest Trust and Savings Bank, Los Angeles, California, in July 1925. His company has devised a very complete set of forms. Mr. Campbell's address was made at the Conference on Trust Functions held during the Annual Convention of the American Institute of Banking at Kansas City, Missouri, in July 1925. A report of this presentation and the ensuing discussion will be found in the proceedings of the Departmental Conferences of that convention.

Among the phases of the subject presented and discussed at the conference referred to, the following may be particularly mentioned:

1. What Is an Escrow
2. What Liability the Bank Assumes When It Accepts Escrow Business
3. How a Bank May Safeguard Itself in the Handling of Escrow Transactions
4. Relationship Created
5. Liability of Depositary
6. Form of Instructions
7. Practices to Be Avoided
8. Escrows Should Afford Protection
9. Handling Escrows As Collections
10. Undesirable Business
11. Qualifications of Personnel
12. Fees for Service
13. Value of an Escrow Department
14. Acting As Depositary under Order of Commissioner of Corporations
15. Deed of Gift Deposited in Escrow
16. Sealed Envelopes
17. Compensation
18. Inactive Escrow Accounts

SUMMARY OF AN ESCROW EXPERT'S ADVICE.—A number of very helpful and interesting observations regarding escrows were made in an address delivered by J. L. Keyes, before the executive council of the Security Trust & Savings Bank of Los Angeles, California, when he was chief escrow officer of that bank. He dealt with the subject in considerable detail, and his address contained the following "warnings" or "don'ts", as well as a few "points of caution":

No instruments should be received for use in the escrow except upon written instructions of the makers thereof.

Do not promise to pay interest on escrow deposits.

Do not give legal advice concerning matters which involve technical points of law, for even lawyers frequently disagree on such matters.

Do not draw complicated documents such as party wall agreements, partnership agreements, easements for driveways, or other purposes.

Do not attempt to write building or other restrictions.

Do not let your escrow be burdened with obligations concerning possession, the title to buildings, the color of paint on a house, the street numbers of property (except as mentioned in the insurance policies), or any matters impossible for the escrow holder to establish other than by joint instructions of the parties in interest.

Do not accept verbal or telephone instructions, particularly from agents as to the disposition of documents or moneys belonging to principals.

Do not pay commissions or pay off any incumbrances until after documents have been filed for record or, in fact, advance any moneys out of the escrow funds prior to filing, without (1) the written order of the owner of the moneys at the time and (2) a written waiver relieving the bank of all responsibility in case the escrow shall fail. Do not permit filing of papers until all moneys and other considerations are either in your possession or properly waived.

Do not assume that personal checks offered in escrows are cash. When payment is offered on the last day contemplated in the instructions, warn the depositor that nothing but cash or a cashier's check will insure his protection. All checks received, of course, should be banked promptly in order that funds may be made available without delay.

Do not permit instructions to contain forfeiture clauses, for they are dangerous and unnecessary. Do not accept escrows in which the usury law is violated. If in doubt, satisfy yourself fully on that point.

Do not accept documents in blank without the approval of an officer.

Do not accept escrows upon real estate, wherein no search is required, without securing both the written approval of all instruments handled as to form and sufficiency and a distinct waiver of responsibility as to the title conditions.

Do not draw documents without filling in all the blanks. In cases in which existing mortgages or trust deeds permit and secure advances, in addition to the original loan, be sure that the mortgagee's statements express or deny such advances; that any second incumbrances in the escrow are satisfied in that regard; and that his instructions so recite.

Do not waive mortgagee clauses in insurance policies except in cases in which you are paying off the incumbrances.

Do not accept sealed envelopes in escrow with contents unknown except upon the approval of an officer.

Do not insert an assumption clause in a deed, whereby the grantee assumes liability for an existing mortgage, without the written consent of such grantee; for the purchase of a property subject to a mortgage is one thing, whereas the purchase of property and the assumption of an existing mortgage is quite another thing, the assumption clause being an advantage to the seller and a possible detriment to the buyer.

POINTS OF CAUTION

Death of a grantor during the running of an escrow need not prevent delivery of his deed, but proceeds thereof should not be disbursed until an administrator or executor has been appointed and has qualified.

All bonds, stocks, bills of sale, and other instruments not to be recorded should have the written approval of the party in whom title is to vest.

In handling water stocks, all matters of transfer by the company or issuance of new stock or any statements as to the condition of the company, its assets, or incumbrances, should, if possible, be omitted from the escrow. If, however, such omission is impossible, then instructions should be clear that no responsibility rests upon the bank beyond the mailing of the certificate to the office of the company with proper instructions.

Mailing addresses should be indorsed on every instrument that is filed for record, and a record should be retained in the escrow.

Inasmuch as a great many things may intervene to delay the closing, refrain from promises as to dates of closing, for an unfulfilled promise is prolific of regrets and blame.

In escrows wherein water rights are to be conveyed by deed or are to be incumbered, the instructions should be so written that the instrument intended to convey or incumber will "recite" that it does so.

Do not, without the consent of the beneficiary, return funds deposited in an escrow, before the time limit of the escrow has expired; nor return them after the time limit has expired, without such consent or the approval of an officer.

Do not accept post-dated checks, without both the written consent of the other parties to the escrow and the attachment of internal revenue stamps on the basis required for notes.

Finally, the student should familiarize himself with the law and practice of his own state; it is necessary to do so, for, as has already been said, in some states escrow business has been very highly developed and is used in connection with a great variety of business transactions, whereas in other states quite the reverse condition exists.

CHAPTER XII

Corporate Trusts

BEFORE entering upon the discussion of fiduciary functions exercised by corporate fiduciaries with respect to corporations, it may be well to consider here briefly the nature of a corporation.

NATURE OF A CORPORATION.—A private corporation is a legal entity, frequently described as an artificial person created by positive law. It is given a name under which it may sue or be sued, may contract and be contracted with, and in many other particulars may act within the scope of its creation as a natural person. It is usually composed of several members each of whom is liable, to a limited extent, for its obligations. These members may die or withdraw from the corporation and others may take their places without affecting its legal existence. This uninterrupted existence during the life of the corporation, notwithstanding changes in its membership, is usually termed "perpetual succession." This definition or explanation of the nature of a corporation was formulated by Honorable O. H. Dean of the Kansas City Bar and is a very comprehensive analysis of the corporate entity.

SOURCES OF CAPITAL.—Primarily, the capital of a corporation is contributed by its members, otherwise termed stockholders. The interest thus obtained is evidenced by certificates of stock.

The capital stock is usually divided into a specified number of shares, and the interest of the individual stockholder is in the proportion which the number of shares he owns bears to the total number of shares issued by the company and held by its stockholders.

Additional funds for corporate enterprises are furnished by persons desiring greater security than is afforded to stockholders and less risk of loss than is borne by them. These additional funds represent money loaned to the company and create the relation of creditor and debtor, which does not exist between the company and its members or stockholders.

Trusteeships under Corporate Mortgages, Equipment Trusts, and So Forth

SCOPE OF DUTIES.—Corporate fiduciary functions, in so far as the creditor-debtor type of corporate financing is concerned, relate to trusteeships for corporate debtors, under indentures securing the debt or limiting the amount thereof, or the amount of other indebtedness; such functions also include the duties of fiscal agents for the payment of bonds and coupons, and they include, whenever the evidences of the debt are to be registered in the names of the owners thereof, the duties of registrars.

REGARDING CHANGE OF TRUSTEE.—A corporate fiduciary, acting as a trustee under an indenture securing an indebtedness, represents the debtor and the creditor; and, ordinarily, in the ab-

sence of specific provisions contained in the indenture, the trustee may not be changed without the consent of both and, usually, by an order of the court having jurisdiction. Most modern indentures contain specific provisions regulating the procedure necessary for the resignation or removal of a trustee and the appointment of a successor.

USUAL MEANS OF FINANCING THROUGH OBLIGATIONS.—One of the most general methods of corporate financing, other than by contributions by the stockholders to the capital stock, is by means of the issue of bonds, notes, debentures, or similar evidences of indebtedness, secured or unsecured, generally termed "obligations." All such terms, however, are used very loosely, and their exact nature cannot be determined simply by the name given them. The security may be real estate, equipment of transportation companies, or collateral of various kinds; or it may be a combination of all. In the cases of unsecured obligations, the indenture under which they are issued usually provides that the debtor shall keep a certain ratio of quick assets to current liabilities and shall be limited in the incurring of other or further indebtedness. There may also be a possible further restriction as to the payment of dividends on certain classes of stock.

CARE AS TO LEGITIMACY IN TRUSTEESHIP.—In connection with the present discussion it may be well to utter a word of caution. As a general proposition, no matter what the business may

be, a trust officer should not necessarily accept it merely because it is offered. This warning applies with special force to the transaction of corporate trust business. The trust officer should be fully assured of the legitimacy of the enterprise and of the ownership of the property affected; he should also know something of the moral character of the business as affected by the personnel involved. Too often the services of a trust organization are sought merely to lend respectability to a questionable enterprise. While a trust company or bank may incur no legal responsibility from the relationship, yet it owes the duty to itself and to others to recognize the moral responsibility involved in the acceptance of a trust, and it should refuse to lend its name to enterprises of doubtful propriety. Such businesses too often appear to pay well; they frequently do so in dollars for a few years, but eventually the answers required by the great number of inquiries that will undoubtedly be received will cause considerable expense. Loss of reputation will almost certainly follow sooner or later. When that time comes, the bank or trust company will often have found that it is too late to turn aside, for the really profitable business of a legitimate character will have gone elsewhere and cannot be secured. In all the discussions of trust subjects herein, it will be assumed, of course, that, prior to its acceptance, not only every piece of trust work undertaken but also its sponsors will have been duly investigated and carefully considered.

OBLIGATIONS MAY BE SECURED OR UNSECURED.—The bonds, notes, debentures, or other obligations issued by corporations in financing their business may be secured by the pledge of real property, chattels, or intangible property of various kinds; also, they may be unsecured, except that, while the obligations are outstanding, the obligor in such obligations may agree to do or refrain from doing certain things.

VARIOUS TERMS USED FOR INDENTURES AND MORTGAGES.—The pledge or promise is usually evidenced by an indenture made and executed by and between the corporate obligor and the trustee. It is usually called a mortgage or mortgage deed of trust or, generally, for convenience, the trust deed.

CORPORATE VERSUS INDIVIDUAL TRUSTEES.—In connection with the financing of corporate obligations, the advantages of employing a corporate trustee rather than an individual trustee are most apparent. There may be thousands of bonds to be certified or very large amounts and varieties of collateral to be held and dealt with by the trustee. Moreover, in cases of long term obligations, successive substitutions of individual trustees, because of death or inability to act, often become necessary; such substitutions are often both tedious and expensive.

As a general rule, corporate obligations, secured by trust deeds in the nature of mortgages, are (1) bonds secured by real estate, (2) bonds secured

by collateral, or (3) equipment trust certificates secured by rolling stock of a transportation company.

A DEBENTURE IS A PROMISE TO PAY. —Debentures are issued under a trust deed in which, as above outlined, the obligor may agree to limit indebtedness, to maintain a certain ratio between current assets and current liabilities, to retire outstanding indebtedness, to pay no dividends at all, or to restrict dividends on certain stock until the retirement of the debentures. In this connection, it must be kept in mind that a "debenture" or "debenture bond" is merely a promise to pay and is not secured by a lien on any specific property.

The forms of indenture used to secure corporate obligations are quite varied. The trustees' powers are exercised solely by virtue of the terms of such indentures, and all their rights, duties, and liabilities—except those imposed by law—are set forth therein. There is no so-called usual or model form. A few of the common forms are as follows:

1. First mortgage is a first lien on whatever property is the subject of the mortgage; such as, in the case of a railroad, the right of way.

2. Refunding mortgage is issued to take up some expiring obligation.

3. General mortgage is a lien on all the property of the corporate obligor—usually not a first lien.

4. Collateral mortgage is secured by deposit of securities.

5. Debenture instrument is used to secure obligations called "debentures" already defined above.

6. Income obligation is a mere promise to pay, usually providing that interest thereon is payable only when and if earned.

7. Equipment trust is secured on the equipment of the corporate obligor; for example, on the locomotives and cars of a railroad, all of which should be identified by the trustee by causing evidence of the fact of legal ownership by the trustee to be placed thereon, by plates or by stenciling or otherwise.

8. Terminal mortgage is a lien on the terminals; for instance, of the railroad obligor.

DISTINCTION BETWEEN PLEDGES OF REAL AND PERSONAL PROPERTY.—Ordinarily, when real property is mortgaged, the instrument is called a "mortgage" or a "deed of trust"; when personal property is pledged, the instrument is called an "indenture" or "trust indenture." For purposes of simplicity, all these instruments will hereafter be referred to as "deeds of trust" unless the text requires special designation.

MORTGAGES.—At common law, a mortgage was a conveyance from one person, called the "mortgagor," to another, called the "mortgagee," of certain property, with a stipulation called a "clause of defeasance," by which it was provided that, if the mortgagor paid to the mortgagee a certain sum of money on a certain day, the conveyance should be void. The fee title vested in the mort-

gagee, as of the date of the conveyance, subject to being defeated by performance of the condition, *i.e.*, the payment of the debt by the mortgagor. If, however, the mortgagor failed to pay the debt on the very day it was due, the title of the mortgagee became absolute and the mortgagor lost his property entirely; there was no subsequent right in the mortgagor to redeem.

EQUITY.—Recognizing the hardships imposed by the enforcement of such forfeitures and considering that a mortgage was in fact only a pledge for a debt, equity interfered for the relief of the mortgagor, by giving him the right to redeem his property by paying the debt, but charging him with a penalty for the delay—interest. Thus arose the privilege known as the "equity of redemption."

FORECLOSURE.—Since it would obviously be unfair to permit such right of redemption to run on indefinitely, it was provided that the mortgagee might by appropriate action foreclose the equity of redemption, *i.e.*, cause the absolute and final forfeiture of all the rights of the mortgagor. In this country, such a result is usually accomplished by a decree of foreclosure, providing that if the property be not redeemed by a specified date it shall be disposed of at public sale and the proceeds applied to the payment of the debt for which the mortgage was given as security. The surplus, if any, remaining after payment of the debt in full has been made —including interest and the costs of the foreclosure—is returned to the mortgagor.

In this country a mortgage is generally looked upon merely as security for a debt, and the title is regarded, for most purposes, as remaining in the mortgagor.

THE DEED OF TRUST.—In some states, the prevailing method of giving security for a debt is by a deed of trust. The deed of trust is an absolute conveyance by the first party, called the "grantor," to the second party, called the "trustee"; it contains, however, the recitation that it is for the benefit of a third party, called the *cestui que trust,* that it is given in trust as security for the payment of a described debt, and that on the payment of such debt the deed of trust shall be released. The debt so secured is evidenced by a note or notes executed by the grantor and made payable to the party named as the *cestui que trust.* Such deeds of trust usually contain a power of sale; *i. e.,* the trustee is authorized, in event of non-payment of the debt, to sell the property conveyed for the purpose of satisfying the debt. The procedure necessary to effect a valid sale under such a power is usually governed by statute, the usual provision being a requirement that notice of the proposed sale be published for a specified period in a specified manner.

As a rule, the right to possession of property follows the legal title; so that the mortgagor or grantor retains the right to possession of the property conveyed, only by reason of express provision to that effect, contained in the mortgage or deed of trust.

SECURITY AND AUTHENTICATION IN DEEDS OF TRUST.—Originally, of course, there was but one creditor. In fact, there was usually no note given in the case of a mortgage, the mortgage itself being the sole evidence of the debt. It would, of course, be impossible for the modern business corporation to obtain from any one person or firm the vast sums of money necessary for the successful conduct of its business. Hence the necessity for a plan under which the mortgage or deed of trust may be given to one party as security for a large sum. This sum is evidenced by numerous notes or bonds, usually payable to bearer and salable to an undetermined number of purchasers. All notes or bonds, by virtue of the mortgage or deed of trust, are entitled to equal security. In order to identify the bonds or notes—so issued and entitled to the benefit of the security of the mortgage or deed of trust—and in order to prevent the issuance of an amount in excess of that intended to be so secured, the trustee places on each bond or note his certificate to the effect that "This bond is one of the series of bonds described in the within-mentioned deed of trust." The bond or note should contain, of course, an appropriate designation of the instrument under which it is issued. The execution of the certificate by the trustee is termed the "certification" or "authentication."

MATURITY AND SUBSTITUTION OF COLLATERAL.—When notes are secured by collateral, the indenture provides that the collateral

shall be held by the trustee during the existence of the indebtedness. Substitutions are often allowed, under certain conditions, and provision is made for the deposit of new collateral to take the place of that which is maturing or to permit the withdrawal of the cash received as a result of the maturities. Such deposit and withdrawal are usually provided for by the terms of the deed of trust itself.

TRANSPORTATION EQUIPMENT AS SECURITY.—When the security is the rolling stock of a transportation or railroad company, the obligation is in the form of a lease of the equipment. The trustee, who has purchased the security with the money loaned by the holders of the obligations secured by the trust deed, issues the lease to the debtor company. The rent is an amount sufficient to pay interest (or "dividends" as they are often called) and to retire, through a sinking fund, the notes or obligations as they mature. As noted above, each piece of equipment bears a plate showing that ownership is in the trustee. When all the notes have been paid, the equipment is conveyed to the transportation company.

IMPORTANT PRELIMINARIES.—Let us assume that the corporate trustee or individual has received an application or that he desires to act as a trustee for some corporate obligation; that he is satisfied, not only regarding the character and standing of the official personnel of the corporation seeking the loan, but also as to the practicability, propriety, and legality of the proposed enterprise;

and that he approves of the proposed corporate obligor's general reputation for business judgment and sagacity—assuming that a corporation may be said to have such characteristics. Taking for granted all of these conditions, the following preliminaries to acceptance of such a trusteeship should, as a matter of good business policy although not of legal obligation, be most carefully observed:

1. An opinion should be obtained of competent counsel that the obligor corporation is duly incorporated; that it has power to incur the indebtedness contemplated; that all preliminary steps are regular and have been taken; that the bonds or notes when executed will be binding; that the company has good title to the property, real or personal, to be pledged; that the mortgage indenture is a lien thereon; if purporting to be a first mortgage, that it is such and that there are no prior liens; if the obligor is incorporated in a state other than that in which the mortgaged property, if real estate, is located, or, in case the corporation is engaged in business outside of the state of incorporation, that it has complied with the foreign corporation law of the state where the real estate is situate or the corporation is doing business.

2. Copy of articles of incorporation and all amendments thereto should be certified as such by the secretary of the state in which it is incorporated.

3. Copy of by-laws and all amendments should be certified as such by the secretary of the corporation.

4. Minutes of stockholders' meeting authorizing the incurring of the indebtedness should be certified as such by the secretary of the corporation.

5. Minutes reporting details of directors' meetings held in pursuance of stockholders' meeting, at which were adopted and approved the form of indenture and bonds and at which the execution thereof, by officers of the obligor, was authorized and the trustee appointed—all should likewise be certified by the secretary of the corporation.

6. Copy of the form of bond or note or obligation, intended to be issued, should be duly certified.

7. Wherever obligor is subject to regulation by a commerce commission or similar body, whether national or state, or whether under what are popularly known as "blue sky laws" or otherwise, evidence of approval, by such regulatory commission, of the issue of securities should be obtained.

8. Certificates of secretary of the corporation, showing specimen or autographic signatures of officers of the corporation who are authorized to sign the obligations on behalf of obligor, should be obtained.

9. The indenture or trust deed intended to secure the indebtedness should be obtained.

NOTE: Most corporate fiduciaries have this document submitted to and approved by counsel before execution.

10. Municipal or quasi-municipal bonds, such as school district bonds, improvement district bonds, and so forth, should recite on their faces: "It is here-

by certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed as required by law." (Joyce, Defences to Commercial Paper, Vol. 2, Sec. 707.)

The indenture or trust deed, when fully approved after careful consideration of all its terms, should be duly executed by the obligor corporation and the trustee or trustees. The trustee either should obtain assurance of the due recordation of the indenture, or trust deed, or else, before delivering certified bonds, should itself duly record the deed. Upon complete execution and recording, upon delivery of collateral to trustee, or upon affixing name plates to equipment, bonds may be certified and delivered in accordance with the terms of the mortgage indenture.

CERTIFICATION AND DELIVERY.—A few words relative to the certification of bonds, notes, or other obligations would seem appropriate here. The bonds or notes submitted should be compared carefully with the original trust deed. As it is impracticable to compare each bond or note with the original trust deed, it is customary to pick at random every fiftieth bond or note and to compare it with the original appearing in the trust deed. The bonds or notes are then authenticated by the trustee, if an individual, or by the officers, if a corporate trustee. Authentication is accomplished by the execution of the certificate heretofore described on each bond or note. The delivery of bonds may

be made, as agreed upon by the corporate obligor and its bankers, either all at one time or in instalments at different times. Upon delivery either directly or through the bankers, payment of the money loaned upon the security of the bonds or notes issued should be made to the corporate obligor. It is usually no part of the duty of the trustee to see that such payment is made.

OPEN AND CLOSED INDENTURES AND ESCROW BONDS.—Mortgage indentures may be "open" or "closed" or there may be a provision for "escrow bonds." In the closed issue the amount of bonds to be issued is fixed; in the open issue the initial amount to be issued is stated, and provision is made for the issue of additional bonds as more property is acquired or as the property mortgaged is improved. Additional bonds are usually issued only for a part of the actual cost of the additional property or improvements. Such bonds are usually certified and delivered on certificates of the obligor and engineers and valuators with respect to additions and improvements; and also, when additional property is acquired, on the recordation of a supplemental indenture covering such property and satisfactory evidence of the amount paid therefor. Escrow bonds are issued under closed indentures; the total amount of the issue is fixed, but only a certain amount is to be issued immediately and the balance on compliance with conditions as to the retirement of existing indebtedness or the completion of improvements in progress. Bond issues covering work

under construction are an example of this latter class; as architects' certificates are furnished showing completion of work, bonds are delivered for all or a part of the cost thereof.

Closed indentures are used when the amount the borrower will need is definitely known, as in the case of new buildings for industrial concerns. Open end indentures serve such corporations as utilities companies, whose general operations are continually expanding. The total amount of bonds that may be issued under an open end indenture is limited only by the expansion of the company and the acquirement of additional property. As future issues may have to be made in a market still unknown, provision is made for each series to bear such rate of interest and mature at such time as may be decided upon by the directors at the time the additional bonds are authorized.

COMBINED INDIVIDUAL AND CORPORATE TRUSTEESHIP.—Whenever the mortgaged property is wholly or partly in a state or states other than that in which the corporate trustee is incorporated or qualified to do business, it is customary to have an individual co-trustee. If on default the trustee has to assume active duties in such foreign state, the individual trustee may take necessary action. It has been held that, even if an individual is a non-resident of the state where he seeks to act, he cannot be prohibited from acting as a trustee for himself or others. (Farmers Loan & Trust Company v. Railway Company, 27 Fed. 146;

Roby v. Smith, 131 Ind. 342.) The individual co-trustee does not certify the bonds or have other duties while the corporate trustee can act. The individual is generally, though not necessarily, an officer of the corporate trustee.

INSURANCE, TAXES, AND SINKING FUND PROVISIONS.—After certification, the trustee may follow up maintenance of insurance, payment of taxes, and compliance with sinking fund provisions and may call bonds if there is a sufficient sum in the sinking fund. Bonds and coupons are usually payable at the office of the trustee, but, unless it clearly appears that the deposits are with the trustee as such and not with the corporate fiduciary, it is held that the fiduciary is merely a paying or fiscal agent. Insurance policies are payable to the obligor and trustee jointly and, in the event of loss, the trustee collects the insurance and disburses it in accordance with the terms of the mortgage. If there is no provision for disbursement, the trustee may hold the funds until the maturity of the bonds.

If additional bonds are to be issued, under either an open end or an escrow indenture, the trustee must certify such bonds from time to time. Before certifying, the trustee should see that all of the terms of the indenture are complied with. It is often necessary not only that there be additional property, but that the earnings of the company shall have been maintained at a certain amount for a period prior to the issue. If bonds are improvidently issued, the trustee is individually liable.

PROVISIONS OF THE STANDARD INSTRUMENT.—The modern corporate mortgage indenture is more or less a standard instrument. Each draftsman may have his own way of expressing terms, and local law may require peculiar provisions, but in general the same provisions will be found in all well drawn instruments.

There are ten general parts to a corporate mortgage, to wit:

1. Preamble
2. Granting clause
3. Concerning the bonds
4. Covenants of obligor
5. Events of default
6. Remedies in event of default
7. Partial releases
8. Concerning the trustee
9. General provisions
10. Testimonium

Instances might be given of the practical need for the many clauses appearing throughout the instrument. It is better to anticipate a situation that may never arise than to ignore it and find that it cannot be met because of carelessness or ignorance.

The following outline will serve as an index of the provisions of a standard trust indenture:

DATA INCLUDED IN TRUST INDENTURE

1. Date of execution
2. Names of mortgagor and trustee or trustees, with recital of respective states of incorporation
3. Recital of purpose of issue, its amount, denominations of bonds, place of payment, and so forth

4. Recital as to stockholders' and directors' meetings prior to issue
5. Form of bond, coupon, and trustee's certificate
6. Granting clause
7. Description of property
8. General descriptions, if any
9. Exceptions from lien
10. Execution of bonds: denomination, numbers, officers to sign, disposal of bonds by trustee
11. Provision regarding disability of officer after executing, but prior to delivery
12. Provision that only bonds authenticated by trustee shall be valid and secured
13. Clause with regard to registration and release from registration of bonds; also, as to whether fully registerable or as to principal only
14. Provision for temporary bonds and covenant to execute and deliver permanent bonds to trustees
15. Procedure in case of lost, destroyed, or mutilated bonds or coupons
16. Permission to exchange bonds for different denominations having the same aggregate principal amount
17. Covenant of company to pay principal and interest
18. Agreement to pay interest without deduction for taxes (usually limited to 2% income tax and specific provision that covenant does not include inheritance taxes)
19. Agreement that coupons shall not be extended or kept alive after payment; or, in such event, that such coupons shall be subordinated to bonds and coupons otherwise outstanding
20. Undertaking to pay certain personal property taxes on securities, such as the Pennsylvania personal property tax
21. Covenants that the company has good title to property, that liens prior to trust indenture shall not be created (except possibly purchase money mortgages on after-acquired property), and that payment shall be made of prior liens and taxes
22. Covenants as to conditions to be contained in contracts for improvements to or on mortgaged property, as to establishment of depreciation charge, and against impairment of value or reduction of assets, defining current assets and current liabilities
23. Agreements to comply with statutory regulations, to maintain corporate existence, to conduct business, to keep certain records, to furnish statements, and to permit verification
24. Agreement as to insurance and as to disposal of proceeds thereof
25. Undertaking not to merge or consolidate except under certain conditions

26. Sinking fund provisions and disbursement thereof
27. Terms under which bonds may be redeemed, publication, and so forth; provision that deposit of funds for redemption with trustee shall discharge obligor from further liability
28. Statement of what shall constitute a default: Non-payment of principal or interest; failure to make sinking fund deposits; adjudication in bankruptcy; failure to discharge judgments or taxes, or to observe any covenants of company contained in trust deed
29. Permission to trustee to enter mortgaged property, in event of default, and to operate same and provision for disbursement of funds received
30. Provisions under which trustee may foreclose in event of default and manner in which defaults may be waived
31. Disbursement of moneys received at foreclosure and provision that property may be purchased by bondholders and paid for in bonds
32. Stipulation against action by bondholders individually; enumeration of conditions under which trustee is required to act
33. Conditions under which trustee may give partial releases: Resolution of directors (a) that property is not needed for business of company, (b) that sale price is full value of property sought to be released, (c) that sale is to advantage of company and bondholders and will not impair efficiency of company; certificates of appraisers and engineers (1) as to market value of property to be released and (2) to the effect that such property is not necessary to operations of mortgagor company
34. Disbursements of moneys received on partial releases and for property which may be taken by eminent domain
35. Acceptance by trustee; leave to employ agents and counsel and exemption from liability for their acts; exemption of trustee from liability for recitals in trust indenture or bonds, from insuring property or collecting proceeds, and from liability for the value of or title to mortgaged property or for security of bonds
36. Provision that trustee is exempt from duty of seeing to payment of taxes or ascertaining as to performance of covenants of company
37. Provision that trustee is protected in acting on documents believed by it to be genuine; trustee to rely on certificates of company as to existence or nonexistence of any fact
38. Provision that trustee is not compelled to act unless indemnified to its satisfaction
39. Provision that trustee is not liable for any act done in good faith or for mistakes of judgment

40. Provision that trustee is not required to take notice of default until notified in writing
41. Provision that trustee is not personally liable for debts, damages, salaries, or rents while in possession of mortgaged property
42. Provision that money received by trustee under trust indenture is to be treated as special deposit without liability for interest
43. Permission to trustee to own and deal in instruments secured by trust deed
44. Statement that trustee has first lien for charges, expenses, and advances
45. Provision for resignation or removal of trustee and appointment of successor
46. Provision that company is to have possession until default; indenture to be released on payment of obligations secured
47. Statement that indenture is for benefit of bondholders and underwriters
48. Waiver by bondholders of recourse against incorporators, stockholders, or officers of obligor
49. Provision that requests, directions, and so forth, to trustee may be in counterparts; that proof of such execution may be by certificate of an officer authorized to take acknowledgments; and that proof of ownership of bonds may be by certificate of bank or trust company that bonds are held by it for a certain person
50. Provision that invalidity of one provision shall not invalidate whole; successor companies bound by all terms; definition of terms used; execution in multiple; acknowledgment; recordation.

A full copy of such an indenture appears in this chapter.

SPECIFIC DUTIES OF TRUSTEE.—Many mortgage indentures covering real estate permit the trustee to release part of the mortgaged property on the performance of certain conditions. When the trustee is requested to execute such partial releases it should see that all the conditions precedent are strictly complied with and that the funds received are applied in strict conformity with the mortgage or, if other property is received in place of that released, that the new property is brought

under the mortgage by a supplemental indenture duly recorded.

PRACTICE WHEN ALL BONDS AND COUPONS ARE PAID.—When all of the bonds and coupons have been paid or funds provided for the payment thereof, it is proper to release the mortgage. In some cases all of the bonds may not have been disposed of though certified and delivered, or the obligor corporation may have repurchased some of them; such bonds should be presented for examination and cancelation. These bonds and the cash should aggregate the outstanding issue. If the paying agent is another than the trustee, all canceled bonds and coupons should be presented for verification or should be satisfactorily accounted for. If the trustee is also the paying agent, it should be able to satisfy itself as to payment from its records. The release deeds are delivered to the obligor, and its duty is to see that they are recorded and the property cleared of the lien. The bank or trust company must see that all notes, bonds, and coupons have been paid or provided for, before executing a release or satisfaction. If the trustee improvidently releases or satisfies, it is liable to a creditor for any loss.

DEFAULTS.—A mortgagor may default in ways other than failure to pay promptly principal or interest or both, although these defaults are the most common ones under which foreclosure proceedings are started. Mortgage indentures often

provide that in the event of the happening of any of the following, the company shall be considered to be in default and the bondholders may direct the institution of foreclosure proceedings:

1. Failure to pay promptly principal or interest
2. Failure to make sinking fund deposits
3. Adjudication of bankruptcy or appointment of a receiver
4. Failure to pay promptly taxes and assessments
5. Permitting a lien to attach; that is, mechanic's judgment, and so forth
6. Failure to keep covenants on insurance
7. Permitting the premises to remain idle and to depreciate in value for a specified period

It is provided that if the default continues for a certain length of time, usually thirty to ninety days, the bondholders shall have the right to request the trustee to declare all of the indebtedness due and to institute a foreclosure action. The trustee is not required to act unless request is made by a certain percentage of the bondholders and unless indemnity is tendered to protect the trustee against attorneys' fees, court costs, and so forth.

While the trustee, as provided in the indenture, may institute a foreclosure in the event of default, it seldom does so without the request of the bondholders. When a default occurs, the underwriting house and the prominent bondholders form a "bondholders protective committee," which requests the bondholders to deposit bonds with a bank or trust

company as agent of the committee. When a substantial amount in bonds has been deposited, the committee, as representative of the bondholders, requests the trustee to institute the foreclosure suit. The committee represents the bondholders at the foreclosure sale or in a reorganization. It is the better practice to have the deed of trust fix the percentage of bondholders that may compel the trustee to foreclose, upon the deposit of costs and attorney fees or security therefor.

Duties and Liabilities of Trustee

DUTIES UNDER A MORTGAGE INDENTURE.—As has been noted, the duties and liabilities of a mortgage trustee are clearly defined in a well drawn indenture. By the terms of the document, the trustee is usually protected against everything but its own wilful negligence. The trustee is protected against liability for failure of the mortgagor to maintain insurance or for permitting liens to attach to the mortgaged property. These provisions are inserted to negative the responsibility or liability of the trustee.

The certificate of identification appearing on the bond and signed by the trustee does not make it a guarantor of the sufficiency or value of the mortgaged property. (Tschetinian v. City Trust Co., 186 N. Y. 432; Ainsa v. Mercantile Trust Co., 174 Calif. 504; Bauerenschmidt v. Maryland Trust Co., 89 Md. 507; Knickerbocker v. Fort Dearborn Trust & Savings Bank, 219 Ill. Ap. 409.)

In the absence of a release of liability, a trustee has been held liable for failure to record the mortgage indenture. (Cogbill v. Boyd, 77 Va. 450; Miles v. Vivian, 79 Fed. 848.) Such liability is negatived by a recital in the mortgage relieving the trustee from seeing to recordation.

In the event of a loss to a bondholder by reason of the release of mortgaged property by the trustee without authority, it would be liable for such loss. When additional bonds are issued under an open end indenture or escrow bonds are delivered, the trustee should see that all of the provisions of the trust deed have been complied with. Bonds should be delivered only to or upon the authority of the persons named in the trust deed. In cases of improvident issue, it would be possible for the corporation to repudiate and for the bondholders to hold the trustee for the loss.

The duties of the trustee, as set out in the trust deed, are mostly permissive and only a few are mandatory; it is provided that the trustee *may* do certain things and *shall* do certain others. The trust deed provides that the trustee *may* pay taxes or place insurance if the obligor fails to do so. As to call of bonds or disbursement of insurance money, it is provided that the trustee *shall* do these acts when certain conditions have been complied with. The trustee cannot be compelled to perform permissive acts; it can be forced to do the mandatory.

CERTIFICATION AND DELIVERY OF BONDS.—When ready to certify bonds, the follow-

ing precautions should be carefully observed:

1. A check should be made of the bonds as to signatures of officers of mortgagor, corporate seal, numbers, denominations, maturities, and coupons. The trustee should be sure that the total amount of bonds, preferred stock, and common stock does not exceed the charter, statute, and the constitutional limit.

2. Certification should be made by an officer of the trustee.

3. A recheck should be made to see that all bonds have been certified and that none have been mislaid.

4. Delivery should be made to persons named in the trust deed, and proper receipt taken. The trust deed may provide that bonds are to be delivered *to* certain officers or upon the *order* of certain officers or to named bankers or against receipt of cash. Delivery should not be made on *order,* if the delivery is to be made *to* named persons, but only *to* such persons.

PAYMENT OF BONDS AND COUPONS.—While bonds and coupons are usually payable at the bank or trust company named as trustee, the bank or trust company, in making such payment, is not acting as trustee but as fiscal agent of the debtor. A few mortgage trust deeds provide that payments shall be made to the trustee as such, for the retirement of bonds and coupons, and that, after such deposits have been made, the holders of bonds and coupons shall look only to the fund and not to the debtor. This provision is the exception rather than

the rule. For this fiscal service, fiduciaries receive a fee. There is one rate for coupons, usually one-fourth of 1% of the amount of funds disbursed for making payment plus one-eighth of 1% of the same amount for making returns of ownership certificates to the government; and there is a sliding rate, depending on the amount paid, for the payment of bonds.

After payment, the canceled bonds and coupons may be returned to the debtor or they may be incinerated by the paying agent, acting under proper authority, and a certificate of such incineration furnished to the obligor.

Payment of Coupons

DUTIES OF PAYING AGENT.—The following points must be observed in paying coupons:

1. Examination of coupons for genuineness
2. Examination of the coupons to see that only maturing or matured coupons are paid and that there are funds for payment
3. Care that ownership certificates, when required, accompany coupons
4. Cancelation and filing of paid coupons
5. Making of proper return to United States Treasury Department of ownership certificates
6. Return or incineration of canceled coupons

Payment of Bonds

DUTIES OF PAYING AGENT.—The following are necessary in the payment of bonds:

1. Examination should be made of the bond to see that it is genuine, that it is signed by the corporation, that it is certified by the trustee, and that it is not registered.

2. Payment should be made only of maturing or matured bonds and then only if funds are on hand.

3. Payment should be made by check to the order of registered owner if the bond is registered; if the person presenting the bond is not the registered owner or his agent, however, and objects to a check so drawn, then the bond should be declined pending a release by the registered owner to bearer; on securing the release, and on making a second presentation, the bearer should be given cash or a check to his own order; in any event, a release should be procured from the registered owner in order to clear the registration records.

4. Cancelation and filing of paid bonds should be attended to.

5. Final disposition should be made by return or incineration of canceled bonds.

Whenever bonds are called, the trustee should see that sufficient funds are deposited to pay principal, interest, and premium. Proper notice of the call should be given by publication or otherwise, as provided in the mortgage trust deed. Some indentures provide that the debtor shall give certain notice to the trustee of intention to call but do not require that funds for payment be deposited at the time the notice is given. If funds are not deposited

and the notice of call is to be published by the trustee, it should be so worded as to show that the debtor has signified its intention to pay the bonds at a certain time and that payment will be made *if* the necessary funds are received by the trustee. Some calls are published by the debtor and the wording is not important to the trustee. Before releasing the mortgage, the trustee should make sure that the call has been made in accordance with the mortgage indenture and that sufficient funds have been deposited to pay all bonds, interest, and premium.

COUPONS AND INTEREST PAYMENTS. —After a bond has been called, neither the trustee nor the obligor is liable for interest thereon after the call date, if due notice of the call was given in exact accordance with the terms of the trust deed dealing with calls. Such notice is usually given by advertisement. As a practical matter, it is not always possible, prior to the date fixed for payment, to give actual notice to the holders of such called bonds that they have been called. Some paying agents have adopted the practice of refusing to pay coupons detached from called bonds unless the bonds themselves are presented for payment at the same time. Although such practice is without warrant of law, it does have the effect of bringing the matter to the attention of the bondholder, and it tends to save argument regarding notice of the call should subsequent coupons be presented and payment thereof refused. Some paying agents attach a notice to the check issued in payment of the coupons

stating that the bond from which the coupon has been detached has been called.

In other words, if coupons detached from called bonds are paid and no actual notice is given, at the time of such payment, that said bonds have been called, many bondholders, ignorant of the call because they did not see the notice of call published in the newspapers, will send in subsequent coupons for payment and will naturally raise a question if payment is refused. Notice to them as outlined will obviate such difficulties. It will generally result in the presentation of the called bonds for payment, and it will save the holders from the loss of interest. On the other hand, such loss of interest would result if they did not actually learn of the call until six months thereafter, when the coupons next due would be presented for payment and payment would be refused.

The following, which the student should study carefully and in detail, is an illustration of a corporate mortgage in which most of the provisions mentioned above are contained:

(Form of Corporate Mortgage)

THIS INDENTURE, dated the first day of April, 1927, by and between PLAYGROUND COMPANY OF ILLINOIS (hereinafter sometimes called the "Company"), a corporation duly organized and existing under the laws of the State of New Jersey and duly authorized to transact business in the State of Illinois, party of the first part, and INSTITUTE TRUST AND SAVINGS BANK, a corporation organized and existing under and by virtue of the laws of the State of Illinois, as Trustee (sometimes hereinafter referred to as "Trustee"), party of the second part,

WITNESSETH:

WHEREAS, the Company is the owner of certain premises and the building thereon situated in the City of Chicago, State of Illinois, hereinafter more particularly described; and

WHEREAS, the Company has full power and authority to borrow money and to execute and deliver its bonds therefor and to mortgage all or any part of its property as security for such indebtedness; and

WHEREAS, the Company in the exercise of its corporate powers and for the purpose of furthering and accomplishing its corporate business and purposes and, in pursuance of appropriate resolutions duly adopted by its Board of Directors, has determined to borrow money and to create and dispose of an issue of its bonds hereinafter described for the aggregate principal amount of Seven Hundred Fifty Thousand Dollars ($750,000) and to secure the payment of said bonds (sometimes hereinafter described as "bonds"), together with the interest which may become due thereon by a Trust Deed in the form of this indenture, and to convey certain of such property under this indenture; and

WHEREAS, the Company in the exercise of its corporate powers has determined that said bonds shall be executed by the President or a Vice President of the Company and attested by the Secretary or an Assistant Secretary of the Company, in its corporate name and under its corporate seal; that said bonds shall be dated April 1, 1927, shall be for the aggregate principal amount of Seven Hundred Fifty Thousand Dollars ($750,000), and shall become due and payable in the following principal amounts on the following dates, viz: $50,000 on April 1 of each of the years 1929 to 1936, both inclusive, and $350,000 on April 1 of the year 1937; that all of said bonds, together with the interest thereon from April 1, 1927, at the rate of five and one-half per cent (5½%) per annum, (such interest being payable on April 1 and October 1 of each year) shall be payable to bearer or to the registered holder at the office of the Institute Trust and Savings Bank in the City of Chicago, Illinois, in gold coin of the United States of America of the April 1, 1927 standard of weight and fineness, such interest to be evidenced by interest coupons executed by the facsimile signature of the Treasurer of the Company; and that each of said bonds and interest coupons attached thereto and the certificate of the Trustee indorsed thereon shall be substantially in the following forms, save as to distinguishing numbers, denominations, and dates of maturity, to wit:

(Form of Bond)

UNITED STATES OF AMERICA

STATE OF NEW JERSEY

No..... $.....

PLAYGROUND COMPANY OF ILLINOIS

First Mortgage Serial Five and One-Half Per Cent Gold Bond

PLAYGROUND COMPANY OF ILLINOIS (hereinafter called the Company), a corporation organized and existing under the laws of the State of New Jersey and duly authorized to transact business in Illinois, hereby acknowledges itself indebted and promises to pay to the bearer hereof (or if this bond be registered, to the registered holder hereof),..... Dollars ($.....) on the first day of April, 19.. (unless this bond shall have been called for previous redemption, as provided herein and in the Trust Deed herein mentioned), and to pay interest thereon from the date hereof until paid at the rate of five and one-half per cent (5½%) per annum on the first day of October, 1927, and on the first day of April and October in each year thereafter, such interest until maturity (unless called for earlier redemption) being payable only on surrender of the interest coupons hereto annexed as they severally become due. Both principal of and interest on this bond are payable at the office of Institute Trust and Savings Bank in the City of Chicago, Illinois, in gold coin of the United States of America of or equal to the standard of weight and fineness existing on April 1, 1927, without deduction for normal Federal Income Taxes, not in excess of two per cent (2%) of such interest in any one year, which the Company or said Bank or the Trustee herein mentioned or any paying agent of the Company may be required or permitted to pay thereon or to deduct or retain therefrom, under any present or future income tax laws of the United States.

This bond is one of a series of bonds of the aggregate principal amount of $750,000 known as First Mortgage Serial Five and One-Half Per Cent Gold Bonds, of even date herewith and of like tenor and effect, save as to distinguishing numbers, denominations, and dates of maturity, and all issued under and secured by a certain Trust Deed, dated April 1, 1927, duly authorized, executed, acknowledged, and delivered by the Company to Institute Trust and Savings Bank, Trustee, to which Trust Deed reference is hereby made for a description of the property mortgaged and conveyed, the nature and extent of the security, the rights of the holders of said bonds under said Trust Deed, and

the terms and conditions upon which said bonds are issued and secured. As provided in said Trust Deed, said bonds become due and payable in aggregate principal amounts of $50,000 on April 1 of each of the years 1929 to 1936, both inclusive, and in the aggregate principal amount of $350,000 on April 1 of the year 1937.

This bond is subject to redemption at the option of the Company on any interest payment date prior to its specified date of maturity upon giving thirty (30) days' prior notice in the manner provided in said Trust Deed and upon paying, in the manner provided in said Trust Deed, the principal thereof and accrued interest thereon to the date fixed for redemption and a premium of two per cent (2%) of the principal thereof.

In event of default, as in said Trust Deed set forth, the principal of this bond may be declared by the said Trustee to be due and payable before maturity in the manner and with the effect provided in said Trust Deed.

The faith and credit of the Company are pledged for the payment of this bond and all interest hereon according to the tenor and effect hereof, but this bond is a corporate obligation only and no recourse whatsoever, either directly or through any trustee, receiver, assignee, or other person, shall be had for the payment of the principal of or interest on this bond or for the enforcement of any claim based hereon or on said Trust Deed, against any incorporator, subscriber to the capital stock, or any past, present, or future stockholder, officer, or director of the Company, or of any successor corporation, by virtue of any statute or constitution or by the enforcement of any assessment, penalty, subscription, or otherwise, all individual liability of whatsoever kind or nature of incorporators, subscribers, stockholders, officers, or directors being released by the holder hereof by the acceptance of this bond, and being also waived and released by the terms of said Trust Deed.

This bond shall pass by delivery, unless registered in the owner's name in registration books kept for that purpose by Institute Trust and Savings Bank, as Registrar or any other successor of such Registrar, at its office in the City of Chicago, Illinois, and such registry noted hereon by such Registrar. After such registration, no transfer hereof shall be valid unless made on said registration books by the registered holder hereof, or by his duly authorized agent, and such transfer noted hereon, but the same may be discharged from registration by being in like manner transferred to bearer, whereupon transferability by delivery shall be restored, and again and from time to time this bond may be registered and transferred to bearer as before. After registry only the registered holder shall be entitled to receive

the principal hereof, but such registration shall not affect the negotiability of the interest coupons hereto annexed which shall continue to be transferable by delivery, and payment to the bearer thereof shall discharge the Company in respect to the interest therein mentioned, whether or not this bond shall have been registered.

This bond (unless registered) and each coupon hereto attached are issued as and intended to be negotiable instruments, and the Company, by the issuance, and each successive holder hereof, by the acceptance of this bond (unless registered) or such coupons, agrees that the same shall be treated as and deemed to be negotiable instruments, with all of the incidents of negotiable instruments, regardless of whether or not in the absence of such agreement the same would be negotiable.

This bond shall not be valid or obligatory for any purpose until it shall have been authenticated by the execution by Institute Trust and Savings Bank, Trustee, of the certificate indorsed hereon.

IN WITNESS WHEREOF, said Playground Company of Illinois has caused this bond to be signed, in its corporate name, and attested by its proper corporate officers, thereunto duly authorized, and its corporate seal to be hereto affixed and the interest coupons hereto attached to be executed on its behalf, by the facsimile signature of its Treasurer, all the first day of April, 1927.

PLAYGROUND COMPANY OF ILLINOIS
By .....
.....President

Attest:
.....
.....Secretary

(*Form of Interest Coupon*)

No. ..... $.....

On the first day of (April), (October), 19...., unless the bond herein mentioned shall have been duly called for previous redemption, Playground Company of Illinois will pay to bearer at the office of Institute Trust and Savings Bank in the City of Chicago, Illinois, on the surrender of this coupon, $..... in gold coin of the United States of the April 1, 1927 standard of weight and fineness, without deduction for normal Federal Income Taxes, not in excess of two per cent (2%) thereof, being the semi-annual interest due on that date on its First Mortgage Serial Five and One-Half Per Cent Gold Bond No. .....

PLAYGROUND COMPANY OF ILLINOIS
By.....
Treasurer

(*Form of Trustee's Certificate*)

This is to certify that this is one of the bonds described in the within-mentioned Trust Deed.

INSTITUTE TRUST AND SAVINGS BANK,
Trustee

By.....
Assistant Secretary

and

WHEREAS, all necessary and requisite resolutions of the Board of Directors of the Company have been duly adopted, passed, and had and all other necessary corporate proceedings duly had and taken and all requirements of law, relating to the authorization of the bonds and the execution of this indenture and the conveyance of the property, therein described, all as in this indenture provided, have been complied with so as to make the issue of the bonds, hereby secured, and the execution of this indenture, to secure the payment thereof, legal and valid and all in accordance with the certificate of incorporation and any amendments thereto and by-laws of the Company and the requirements of the laws of the States of New Jersey and Illinois, relating to the Company, and of all other statutes and laws in that behalf; and all things necessary to make said bonds, when authenticated by the Trustee and issued under this indenture, valid, binding, and legal obligations of the Company and to make this indenture a valid, legal, and binding instrument, for the security thereof, have been done and performed,

NOW, THEREFORE, THIS INDENTURE WITNESSETH: That in order to secure the payment of the principal and interest of all of the said bonds, at any time issued and outstanding under this indenture according to their tenor, purport, and effect, at the times and places and in the manner in said bonds and interest coupons and in this indenture set forth, and further to secure the performance and observance of all of the covenants and conditions and agreements, therein and herein contained, and to declare the terms and conditions upon which said bonds and interest coupons are issued, authenticated, secured, received, and held and, for and in consideration of the premises and of the purchase and acceptance of said bonds by the holders thereof and of the sum of $100, duly paid by the Trustee to the Company at or before the ensealing and delivery of this indenture (receipt whereof is hereby acknowledged) said Playground Company of Illinois, party of the first part hereto, has executed and delivered this indenture and hereby grants, bargains, sells, remises, releases, confirms, transfers, assigns, sets over, mortgages, warrants, and conveys unto said Institute

Trust and Savings Bank, as Trustee, its successors and assigns, with all rights of substitution and with full subrogation to any and all warranties of or rights of action against previous vendors or holders of title or other persons, the following described property (which is sometimes hereinafter collectively called the "trust estate") situated in the City of Chicago, County of Cook, and State of Illinois, to wit:

Conveying Clauses Subparagraph A

Lot Eight (8) in Assessor's Division of Lots Two (2) and Three (3) in Block Eight (8) in Fractional Section Fifteen (15) Addition to Chicago, subject only to the matters and things hereinafter specified;

Conveying Clauses Subparagraph B

Together with all and singular the buildings, structures, and improvements of every kind and character which now are or may hereafter be placed or located on the above-described premises (and, without limiting the generality of the foregoing, all furnaces, boilers, heating, lighting, plumbing, and ventilating apparatus, gas and electric fixtures, elevators, theatre equipment, seats, scenery and fittings, and all machinery, now or hereafter thereon and/or therein, and all equipment and fixtures now or hereafter therein, all of which are hereby declared to be real estate for the purposes of this mortgage), and all easements, rights, privileges, hereditaments, and appurtenances whatsoever unto the hereby granted and demised premises and estates belonging and appertaining; and the reversions and remainders thereof; and all the estate, right, title, interest, possession, claims, and demands of every nature and kind whatsoever of the Company, as well at law as in equity, to, in, and about the same, and every part and parcel thereof; and also together with the rents, issues, and profits of the above-described premises, buildings, structures, and improvements (all of which are hereby specifically assigned to said Trustee), and it is understood that so long as there shall be no default hereunder the Company shall be entitled to possess, use, enjoy, operate, manage, and control the property hereby conveyed and the whole thereof and shall also have the right to take, use, and dispose of the rents, issues, and profits of said property and the income and revenue to be derived therefrom.

Conveying Clauses Subparagraph C

The specific recital of property rights herein contained is not in limitation and shall not be construed as in limitation of the general recitals or descriptions of such property and rights.

Conveying Clauses General Title

All of the property conveyed by and subject to this indenture is sometimes hereinafter for brevity called the "Trust Estate."

TO HAVE AND TO HOLD all and singular the above-described property and all other property which by the terms hereof is or may be or become subject to the lien of this indenture, unto the said Trustee, its successors in trust, and assigns forever, IN TRUST NEVERTHELESS, for the equal, common, and ratable use, benefit, and security of all and singular the person or persons, firm or firms, body or bodies politic or corporate, which shall, from time to time, be holders of any of the said bonds above described or the interest coupons thereto appertaining and without preference of any of said bonds over any others by reason of priority in the time of issuance or negotiation thereof or otherwise howsoever, subject, however, to the terms, provisions, and stipulations in the said bonds contained and to the terms, conditions, provisions, and agreements hereinafter expressed and declared and for the uses, purposes, and trusts hereinafter set forth, and the lien of this indenture shall take effect from the date thereof, regardless of the date of issuance or negotiation of said bonds or coupons.

The Company covenants that it is lawfully seized and possessed of the property above presently conveyed in fee simple, subject only to the rights, if any, of the owners of the property adjoining said Lot Eight (8), in and to the south ten (10) feet of the above-described premises and the west ten (10) feet of the above-described premises, and to current taxes and special assessments not yet due. The Company further covenants that it has good right to convey the property above conveyed and that the same is unincumbered except as aforesaid. The Company further warrants forever to defend the title to the property hereby conveyed unto said Trustee, its successors, and assigns, against the lawful claims of all persons whomsoever subject only as aforesaid.

And it is hereby declared that the terms and conditions, upon which the bonds and the interest coupons are to be issued, authenticated, delivered, and secured, and the terms and conditions, upon which the Trust Estate is to be held and disposed of by the Trustee, are as follows:

ARTICLE I

FORM, ISSUANCE, CERTIFICATION, AND REGISTRATION OF BONDS

Section 1. The bonds issued under and secured by this indenture shall be substantially in the form hereinbefore set forth and shall be

limited to the total principal amount of Seven Hundred Fifty Thousand Dollars ($750,000). Said bonds shall become due and payable at the following times and for the following aggregate principal amounts, viz: $50,000 on April 1, 1929; $50,000 on April 1, 1930; $50,000 on April 1, 1931; $50,000 on April 1, 1932; $50,000 on April 1, 1933; $50,000 on April 1, 1934; $50,000 on April 1, 1935; $50,000 on April 1, 1936; and $350,000 on April 1, 1937. Said bonds may be in denominations of $1,000 and $500. Bonds of the denomination of $1,000 shall be numbered from M-1 upwards and bonds of the denomination of $500 from D-1 upwards. Said bonds shall be dated April 1, 1927, shall bear interest at the rate of five and one-half per cent (5½%) per annum, until paid, payable semi-annually on the first day of April and the first day of October of each year after the date thereof, commencing October 1, 1927; and the principal and interest thereof shall be payable at the office of the Institute Trust and Savings Bank in the City of Chicago, Illinois, in gold coin of the United States of America of the April 1, 1927 standard of weight and fineness; each interest instalment shall be payable without deduction for normal Federal Income Taxes not in excess of two per cent (2%) of such interest, which the Company, its successors, or assigns, or said Bank or the Trustee herein mentioned or any paying agent or any of them may be required or permitted to pay thereon or to deduct or retain therefrom under any present or future income tax law of the United States. The bonds issued under this indenture irrespective of their actual dates of issuance or negotiation or maturity shall be equally and ratably secured hereunder, without preference or priority of principal over interest or of interest over principal.

Section 2. Both this indenture and the bonds above described shall be executed by the President (or a Vice President) and attested by the Secretary (or an Assistant Secretary) of the Company (it not being necessary for the same officer or officers to execute all of said bonds), and, in case the persons who occupy those offices at the date of this indenture shall not continue to be such officers at the time when this indenture (or said bonds) shall be actually executed, the execution hereof and of said bonds shall be by the persons who may at the time of such execution be such officers; and this indenture and said bonds shall in all things be the acts, deeds, and obligations of and binding upon the Company regardless of who shall be the officers who execute them or whether there may be any change in the personnel of said officers. In case any officer who shall have signed or sealed said bonds or any of them shall cease to be such officer of the Company before any or all of the bonds so signed and sealed shall have been actually authenticated and delivered by the Trustee or negotiated, such bonds may

nevertheless be authenticated by the Trustee and issued, delivered, and negotiated, and shall in all respects be the obligations of the Company as though such person had not ceased to be such officer of the Company. The interest coupons shall be authenticated by the facsimile signature of the Treasurer of the Company at the date hereof, and the Company may adopt and use said interest coupons, and the same shall in all respects be the obligations of the Company, notwithstanding the fact that said Treasurer, whose signature is so used, may have ceased to hold such office at the time when said bonds or coupons or any of them shall be actually authenticated by the Trustee, issued, delivered, or negotiated.

Section 3. Only such bonds as shall have indorsed thereon the certificate of the Trustee, signed by the Secretary or Assistant Secretary or other duly authorized officer or agent of the Trustee, shall be obligatory for any purpose, or shall be secured by this indenture, and every such certificate upon any bond executed on behalf of the Company shall be the only and conclusive evidence that the bond so authenticated has been duly issued hereunder; and no holder of any bond which shall be so authenticated shall be under any duty or obligation to ascertain whether the same shall have been duly authenticated, issued, or delivered, according to the provisions hereof.

Section 4. On the execution of this indenture there shall be executed on behalf of the Company and delivered by the Company to the Trustee, Seven Hundred Fifty Thousand Dollars ($750,000) in aggregate principal amount of said bonds (being all of the bonds issuable hereunder), whereupon said Trustee shall authenticate and deliver said bonds to or upon the written order of the Company signed by its President (or a Vice President) under its corporate seal. The Trustee may in its discretion authenticate and deliver said bonds in advance of the filing for record or recording of this indenture. Said bonds shall be authenticated and delivered by said Trustee in such of the aforementioned denominations as shall be specified in a written order of the Company signed by its President (or a Vice President) under its corporate seal.

Section 5. Until the permanent bonds to be issued under this indenture are prepared, the Company may execute and the Trustee shall authenticate and deliver, in lieu of said permanent bonds, printed or typewritten temporary bonds to or upon the written order of the Company signed by its President (or Vice President) under its corporate seal. Such temporary bonds shall be substantially of the tenor of the bonds hereinabove recited, except that they shall not be registerable and no coupons shall be attached thereto and may be for the principal amount of $1,000 or $500 or any multiple thereof as the Presi-

dent (or Vice President) of the Company may determine. Each temporary bond shall bear upon its face the words "Temporary Bond, exchangeable for Permanent Bond," and shall be authenticated and delivered by the Trustee in the same manner as the permanent bonds, and such authentication shall be conclusive evidence that the bond so authenticated has been duly delivered to the Company or upon its order, in accordance with the provisions of this indenture, and is duly issued under and entitled to the security of this indenture. Such temporary bonds issued and authenticated hereunder shall be exchangeable by the holders thereof for permanent bonds of the same maturity or maturities and of an equal aggregate principal amount to be issued hereunder, and upon any such exchange such temporary bonds shall be forthwith canceled by the Trustee. Until so exchanged, the temporary bonds shall in all respects be entitled to the lien and security of this indenture as bonds issued and authenticated hereunder, and interest when and as payable shall be paid and indorsed thereon. The Company covenants and agrees to cause said permanent bonds to be forthwith prepared and executed and delivered to the Trustee.

Section 6. Said bonds (unless registered) and each coupon thereto attached shall be issued as, and are intended to be, negotiable instruments, and the Company, by the issuance, and each successive holder thereof, by the acceptance, of any such bonds (not registered) or coupons, agrees that the same shall be treated as and deemed to be negotiable instruments with all of the incidents of negotiable instruments, regardless of whether or not in the absence of such agreement the same would be negotiable.

Said bonds shall pass by delivery unless registered for the time being in the name of the holder on books kept for that purpose by Institute Trust and Savings Bank, as Registrar, at its office in the City of Chicago, Illinois, such registry being noted on the bond or bonds by said Registrar, after which no transfer of said bond or bonds so registered shall be valid unless made on said books by the registered holder in person or by his agent, duly authorized in writing, and such transfer similarly noted on the bond or bonds; but any bond may be discharged from registry by being in like manner transferred on said books to bearer, after which it shall be transferable by delivery; but again and from time to time any bond may be registered and transferred to bearer as before. The registry of any bond shall not impair the negotiability of the interest coupons, which shall always continue to be negotiable and transferable by delivery notwithstanding such registration. The Company and said Registrar and the Trustee shall not be bound to take notice of any trust appearing or referred to in the registered name or description of the registered holder of any bond, and said Registrar may

transfer the same on the directions of the registered holder thereof, whether named as trustee or otherwise, as though such person were the beneficial holder thereof. All expenses of registration and transfer of bonds shall be borne by the holders. The Company and the Trustee and the Bank at which the bonds and interest coupons are payable may deem and treat the bearer of any bond, which shall not at the time be registered, as hereinabove authorized, and the bearer of any coupon for interest on any such bond, whether such bond be registered or not, as the absolute holder of such bond or coupon for the purpose of receiving payment therefor and for all other purposes whatsoever, and the Company and the Trustee and said Bank shall not be affected by any notice to the contrary.

Section 7. In case any bond with the coupons thereto appertaining shall become mutilated or be destroyed or lost, the Company in its discretion may issue, and thereupon the Trustee shall authenticate and deliver, a new bond of like tenor, date, and amount, bearing the same serial number and date of maturity, in exchange and substitution for and upon cancelation of the mutilated bond and its coupons or in lieu of and in substitution for the bond and its coupons so destroyed or lost. The applicant for such substitute bond shall furnish to the Company and to the Trustee evidence of the destruction or loss of such bond and of its coupons so destroyed or lost, and evidence of ownership of any bond so mutilated, destroyed, or lost, which evidence shall be satisfactory to the Company and to the Trustee in their discretion, and said applicant shall also furnish indemnity satisfactory to said Company and the Trustee, respectively, and comply with such other reasonable regulation as the Company or the Trustee may prescribe.

Section 8. In case the time for payment of any bonds or coupons shall be expressly extended, whether or not such extension be with or by the consent of the Company, such bonds or coupons (subject to the provisions of Section 9 of this Article) shall not be entitled, in case of any default hereunder, to the benefit of this indenture, except subject to the prior payment in full of the principal of all bonds issued hereunder then outstanding and matured (by declaration or otherwise), prior to such extended time of payment, and of all matured coupons and of all other accrued interest on the bonds, the payment of which shall not have been so extended and which shall mature (by declaration or otherwise) prior to such extended time of payment.

Section 9. If at any time the Company shall fail promptly to provide funds with which to pay and take up any bonds and interest coupons at the place or places where they are payable and at the date or dates of their fixed maturity, the said Institute Trust and Savings Bank, in its banking capacity, may at its option purchase the same when

and as they may be presented for payment or thereafter, without giving notice of any such purchase to the holders of bonds or coupons secured hereby or to any of them, such holders hereby constituting the Trustee in its capacity as Trustee or paying agent hereunder, their agent for the purpose of making any such sale or sales; such bonds or coupons so purchased shall not be subject to the provisions of Section 8 of this Article but shall be considered as past due obligations of the Company, and said Bank shall in all respects be deemed and treated as the bona fide holder of said bonds or coupons so purchased and shall be entitled to enforce the same, in all respects irrespective of being and as if it were not the Trustee hereunder.

Section 10. No bonds or coupons, which may be paid or redeemed by the Company or the Trustee under any Article hereof (except as provided in Section 9 of this Article), shall be reissued, but the same shall be canceled by the Trustee and delivered to the Company; provided, however, that this shall not prevent the Trustee from holding, purchasing, or selling any of said bonds or interest coupons in any capacity other than as Trustee hereunder.

Section 11. Upon the timely deposit with the Trustee, as herein provided, of the proper amount, for the payment of any bonds or interest coupons upon their maturity or for their prepayment as provided in any Article hereof, such bonds and coupons shall be considered and held as paid and canceled, and the Company shall be under no further obligation to the holder or holders of such bonds or coupons; nor shall the Trustee be liable other than for the moneys so deposited to be paid without interest upon the surrender of the bonds or coupons, on account of which such deposit was made.

Section 12. Every holder of the bonds hereby secured accepts the same, subject to the express understanding and agreement that every right of action whether at law or in equity under this indenture is vested exclusively in the Trustee, and under no circumstances shall the holder of any bonds or coupons or any number of such holders have any right to institute any action at law or any suit or proceeding in equity or otherwise under this indenture or upon any bond or coupon secured hereby, for the purpose of enforcing any covenant or remedy herein, or in said bonds or coupons contained, or to foreclose this indenture, unless the Trustee shall refuse to comply with such duty imposed upon it, in respect of any such covenants or remedy, or to foreclose this indenture, after request by the holder or holders of at least one-fourth in principal amount of the bonds then outstanding hereunder and the production of such bonds by the holders thereof, to the Trustee, or the furnishing by such holders of evidence satisfactory to the Trustee that they are such holders and the giving to the

Trustee of indemnity satisfactory to it, securing it against liability by reason of the action requested; but no inaction by the Trustee on any such request shall be deemed a refusal until after the expiration of a reasonable time (not less than thirty [30] days) for the consideration thereof by the Trustee.

ARTICLE II

COVENANTS OF THE COMPANY

Section 1. The Company covenants to and with the Trustee as follows:

a. That it will duly and punctually pay or cause to be paid the principal and interest of each and all of said bonds as and when the same become due and payable, according to the tenor and effect thereof, in gold coin of the United States of America of or equal to the April 1, 1927 standard of weight and fineness, notwithstanding any law which may now or hereafter make anything else legal tender for the payment of debts; and that it will pay each instalment of interest without deduction therefrom of any normal Federal Income Taxes, not in excess of two per cent (2%) of such interest, which the Company, its successors, or assigns, or the Bank, at which said bonds are payable, or the Trustee or any paying agent or any of them may be required or permitted to pay thereon or to deduct or retain therefrom, under any present or future income tax law of the United States.

b. That it will promptly, and before they shall become delinquent, pay or cause to be paid all taxes, assessments, and governmental charges which may from time to time be legally imposed, assessed, or levied upon or against the property, hereby conveyed, or upon any part thereof, or which are or may be or may become a lien thereon; that it will furnish the Trustee, on request, with satisfactory evidence that such taxes or charges have been paid; that it will pay or cause to be paid any judgment or other incumbrance the lien whereof might be held superior or equal to the lien of this indenture upon the property hereby conveyed or upon any part thereof, so that the priority of this indenture shall at all times be fully maintained and preserved; provided, however, that it may with the written consent of the Trustee, thereto first had and obtained, or, upon furnishing proper security to the Trustee, resist in any legal way the payment of any tax, assessment, judgment, lien, or other incumbrance upon the property hereby conveyed or upon any part thereof, which may become a lien thereon and which it may deem unjust, illegal, or invalid; that it will at

any time or times, at the written request of said Trustee, furnish to said Trustee within thirty (30) days after receipt of said request a statement verified by oath of its President, Vice President, Secretary, or Treasurer, showing accurately whether any taxes assessed on the property hereby conveyed or any part thereof or any interest therein are delinquent and unpaid and, if so, as to what property and the reason therefor and, in similar manner, whether any tax sale has occurred affecting any of the property covered hereby; and that it will also furnish, if requested by the Trustee, within thirty (30) days after the receipt of such request, certificates from the collector of taxes, showing whether such taxes, assessments, or levies are unpaid or tax sales have occurred since the date of this indenture or the date of the last certificate furnished to the Trustee.

c. In the event that the Company shall fail seasonably to pay such taxes, assessments, governmental charges, or levies or any charges or liens, which might or could be held prior or equal to the lien of this indenture, and the Company does not resist the same (as provided in Paragraph b of this Section), the Trustee may at its option pay such taxes, assessments, governmental charges, or levies or other charges or liens, without prejudice, however, to any rights of the Trustee or the bondholders hereunder arising in consequence of such failure, and the amount of any and every such tax, assessment, governmental charge, or levy or other charge or lien, and any sum of money, at the time and for such purpose paid by the Trustee with interest at the rate of seven per cent (7%) per annum, shall be repaid by the Company upon demand and shall become so much additional indebtedness secured by this indenture and shall be given a preference in payment over any of the bonds or coupons and shall be paid out of the proceeds of any sale of the Trust Estate or any part thereof or out of any funds received by the Trustee hereunder, if not otherwise paid by the Company; but the Trustee shall be under no obligation to pay any such taxes and assessments or other governmental charges or levies or other charges or liens unless fully indemnified against the expense thereof and furnished with means therefor.

d. That it will not voluntarily create or voluntarily suffer to be created any lien or charge whatsoever against the Trust Estate or any part thereof prior or equal to the lien of this indenture (except such as it may deem unjust, illegal, or invalid and as it may resist as herein provided) or do any act or thing whereby the lien or security hereof may be impaired; and the Company agrees that it will do all things reasonably proper to protect and preserve the

Trust Estate and the integrity and security of the bonds and coupons issued hereunder.

e. That it is lawfully seized and possessed of the above-described real property and premises and other property herein by it conveyed; and that it has good right and lawful authority to sell, assign, transfer, pledge, and convey the said premises and property; and that said premises and property are free and clear of and from all incumbrances and charges whatsoever (except as herein otherwise stated); and that it will warrant and defend the same to the Trustee, for the benefit of the holders of the bonds issued hereunder, against the lawful claims of all persons whomsoever.

f. That it will duly record and file this indenture and any other instruments supplemental thereto as may be required by law, in order to preserve or renew the lien of the same; that it will, on demand of the Trustee, do all acts necessary or proper to keep valid the lien hereby created or intended to be created and, at any future time and as often as it may be necessary, will execute on demand of the Trustee all such additional affidavits, deeds, mortgages, or instruments in writing in due form and effect as may be proper for better carrying out of the true intent and meaning of this indenture.

g. That it will furnish to the Trustee annual balance sheets and statements of earnings of the Company certified to by the Treasurer or the Auditor of the Company, and that once each year it will furnish to the Trustee an annual statement of earnings and balance sheet of the Company certified to by some firm of certified public accountants satisfactory to said Trustee.

h. That, in case of suit or action hereunder to enforce the collection of any of said bonds or interest coupons, the Company shall and will pay such reasonable counsel or attorney's fees as may be allowed by order, decree, or judgment of the court in which such suit or suits or action or actions may be brought.

i. That it will not directly or indirectly extend or consent to the extension of the time of payment of any of the bonds or interest coupons secured hereby, by purchase or funding of such bonds or coupons or by any other arrangement, unless and except such extension shall be subject to the terms and conditions of Section 8 of Article I of this indenture.

j. That it will keep proper books of record and account showing full, true, and perfect entries of all dealings or transactions relating to its business affairs, which books shall at all times be open to the inspection of the Trustee; and that whenever requested by the Trustee it will furnish to said Trustee a schedule showing, with

reasonable details, the items of the estate, property, and interests covered by the lien hereof.

k. That at all times, during the existence of any of the indebtedness secured hereby, it will keep insured against loss or damage by fire or lightning, in amounts not less than those carried by it at the date hereof (but at no time in amounts less than Two Hundred Fifty Thousand Dollars [$250,000]), all its buildings and structures of every kind and all machinery, equipment, appliances, appurtenances, and other property comprising part of the Trust Estate. The Company shall also maintain public liability insurance and so-called "fixed liability" insurance, in amounts not less than those carried by it at the date hereof, and insurance adequate under and pursuant to all Workmen's Compensation and Liability Acts and insurance against boiler explosion in reasonable amounts. The Trustee shall be under no obligation to determine any amount of insurance required to be carried hereunder and, in making any determination, may accept and act upon the opinion of any insurance expert or adviser selected by it for that purpose. All insurance carried shall be in insurance companies legally qualified to transact business in the State of Illinois, and such companies shall be satisfactory to the Trustee; such insurance, covering loss or damage to property, shall be made payable in case of loss to the Trustee hereunder, and the Company or its insurance agents shall furnish to the Trustee when and as requested by the Trustee a list or lists of all such policies, which shall show the names of the companies issuing the same, the number and amount of each policy, the dates of expiration, and property covered by each policy and the name and post office address of the agent issuing the same; and the Company, if requested by the Trustee hereunder, shall deposit said insurance policies with said Trustee and, if required by said Trustee, shall also furnish evidence to said Trustee showing the payment of the insurance premiums upon said policies. In the event of any loss covered by any policy of insurance, any appraisement or adjustment of such loss and settlement and payment of indemnity therefor, which may be agreed upon between the Company and the insurance company, may be consented to and accepted by the Trustee; but the Trustee shall be in no way liable or responsible for failure to collect any insurance money that may become due, under the provisions hereof or of the policies above mentioned, but only for such amounts as shall actually come into its hands or be deposited with the Trustee as the proceeds of such policies. All insurance proceeds received by the Trustee shall be held by the Trustee hereunder subject to the provisions of this indenture with

respect to the application thereof. Upon the written request of the Company, signed by its President, Vice President, or Treasurer, the Trustee, at any time at which the Company shall not be in default hereunder, shall allow any moneys received by it from such insurance to be applied toward the repair of or replacement or addition to the property destroyed or damaged or toward payment for a new building on the premises above conveyed; but no payment shall be made for that purpose unless and until the Trustee shall be furnished with architect's certificates and a statement or statements verified by the affidavit of the President, Vice President, or Treasurer of the Company and accompanied by receipted vouchers (if the Trustee so requests) showing that the Company has theretofore made actual expenditures to an amount equal to or greater than the amount of money, which is sought to be obtained from the Trustee, in or about the repair of or replacement or addition to the property damaged or destroyed or such new building, or has actually made such repairs, replacements, and additions or completed such new building or incurred liabilities therefor; in which last event said money shall be paid over by said Trustee upon architect's certificates for the discharge of said liabilities, and further showing that, upon the payment over to the Company by said Trustee of all such insurance moneys, for the purposes aforesaid or for the discharge of said liabilities, the repair or replacement of or addition to the property destroyed or damaged or such new building will be entirely paid for, free and clear of any prior liens other than the lien of this indenture, and that said repairs or replacements or additions or such new building shall be or shall become subject to the lien and conditions of this indenture, in like manner and to the same extent as the property which was damaged or destroyed; provided, however, that when the total amount of insurance moneys collected or received by the Trustee on account of any one loss does not exceed $10,000, the Trustee, upon request of the Company, shall pay such amount over to the Company without requiring the Company to comply with the terms and conditions hereinbefore stated, so long as the Company is not in default hereunder; and provided, further, that in the event of the receipt by the Trustee of amounts of insurance moneys upon subsequent losses of not to exceed $10,000, such amounts shall not be paid over to the Company as herein provided, until the Company shall have furnished evidence satisfactory to the Trustee that the property, upon which the prior successive losses of not to exceed $10,000 each were collected, has been replaced or restored to its original value and subjected to the lien of this indenture or that

other property, respectively equal in value to the amount of such respective losses, has been added to the property which is subject to the lien of this indenture and subjected to the lien thereof. All repair or reconstruction work or the construction of any new building, for which insurance moneys are to be applied, shall be done according to plans and specifications which shall be submitted to the Trustee. Anything herein to the contrary notwithstanding, if the Company shall fail to commence such repairs, replacements, or additions or to commence to construct such new building on the premises, above conveyed, within six months after the receipt of such moneys by the Trustee, or shall, after commencing as aforesaid, at any time fail diligently to carry on such repairs, replacements, or additions or the construction of such new building, then the sums so collected shall be held by the Trustee to be by it applied toward the payment of the principal of the bonds issued hereunder and secured by this indenture, at their fixed maturities, in the serial order of such maturities, or may, at the option of the Trustee, be used under the provisions of Article III of this indenture for the redemption of outstanding bonds, such moneys, however, to be used only toward the payment of the principal of such redeemed bonds; and the Company agrees to deposit with the Trustee in apt time, sums sufficient to pay the redemption premiums and accrued interest applicable to the bonds so called for redemption. The Trustee may accept said certificates herein provided to be filed with the Trustee as conclusive evidence of the facts therein stated, but the Trustee (although it shall be under no duty so to do), at the expense of the Company, may require further or other evidence of any such matters and may rely upon the report or opinion of any expert or counsel it may select for the purpose of investigating the same. In the event that the Company fails to effect insurance as aforesaid, the Trustee may in its discretion procure such insurance, and all moneys paid by the Trustee for such insurance, together with interest thereon at the rate of seven per cent (7%) per annum shall be repaid by the Company upon demand and shall become so much additional indebtedness secured by this indenture and shall be given a preference, in payment, over any of said bonds or coupons and shall be paid out of the proceeds of any sale of the Trust Estate or out of any funds received by the Trustee hereunder, if not otherwise paid by the Company, before any payment shall be made on said bonds or coupons. The Trustee, however, shall be under no obligation to effect such insurance unless fully indemnified against the expense thereof and furnished with means therefor. Any new building (con-

structed under the terms of this Subparagraph k) shall be of a value, when completed, at least equal to the value of the building or improvement so damaged or destroyed.

It is understood that the Company shall not be required (but shall have the right), in the event of damage or destruction by fire or other casualty of any building or improvement at any time upon the premises hereby conveyed, to repair, renew, or replace any such building or improvement or to construct a new building on the premises hereinabove conveyed.

l. That at all times, during the existence of any of the indebtedness hereby secured, it will maintain, preserve, and keep in repair and good working order and condition all its buildings, structures, machinery, equipment, and other property subject to the lien of this indenture and/or used in the conduct of its business, so that the efficiency of said property will not be impaired and so that they will comply with all ordinances of the City of Chicago, relating thereto or to the operation thereof; that it will preserve its corporate organization and do no act by which it might incur forfeiture of its corporate existence, but that it will comply with all lawful statutes, acts, and regulations affecting the Company and/or the Trust Estate.

m. Anything in this indenture to the contrary notwithstanding, the Company, at any time at which it shall not be in default hereunder, shall have the right to make any and all alterations, replacements, additions, or changes in any building or improvement at any time upon the demised premises, which upon completion thereof will not lessen the value of the building or improvement prior thereto on the premises hereby conveyed. At any time at which it shall not be in default hereunder, the Company shall also have the right to remove the building or improvement at any time standing on the premises hereby conveyed for the purpose of substituting therefor other buildings or improvements of a value, when completed, at least equal to the value of the buildings or improvements so removed; provided, however, that the Company shall, before commencing to remove any such building or improvement, furnish to the Trustee security satisfactory to the Trustee that said new buildings or improvements will be completed within a reasonable time free and clear of any and all liens equal or prior to the lien of this indenture. In the event that the Company shall make any such alterations, replacements, additions, or changes or shall remove any such building or improvement, the Company covenants and agrees that it will, within a reasonable time, complete such alterations, replacements, additions, or changes or replace said building

or improvement so removed, with a new building or improvement, free and clear of any and all liens equal or prior to the lien of this indenture. Any salvage resulting from any such alterations, replacements, additions, or changes or such removal, shall belong to the Company, free and clear of the lien of this indenture.

n. That it hereby expressly exercises the option to have the interest of the Company and the Trustee in the Trust Estate assessed and taxed, together without separate valuation to the Company, the same as if said property were unincumbered.

o. That there is now outstanding no indebtedness of the Company secured by mortgage lien or other lien upon the Trust Estate other than the lien of this indenture; and that so long as any of the bonds or interest coupons issued hereunder are outstanding and unpaid or provision has not been made for the payment or redemption thereof in accordance with the terms of this indenture, the Company will not make or permit to be incurred any lien upon any of the Trust Estate other than the lien of this indenture, unless the instrument creating such lien shall specifically provide that such lien shall be subject, subordinate, and inferior to the lien of this indenture as security for the payment of said bonds, coupons, and other charges hereby secured; and that neither the Company nor any other person or corporation shall have any right or power to do any act or thing whereby any mechanic's lien, under the laws of Illinois, can arise against or attach to the Trust Estate or any part thereof or any improvements now or hereafter constituting any part of the Trust Estate, unless such lien shall first be wholly waived as against this indenture.

p. That the Trustee and its representatives shall at all reasonable times have and be given access to the mortgaged premises and building and to the corporate records and books of account of the Company, for the purposes of examining the same or ascertaining whether all of the provisions of this indenture with respect thereto have been complied with, but the Trustee assumes no obligation or liability in respect thereto.

Section 2. Nothing in this indenture or in the bonds and coupons contained with respect to the aforesaid covenants of the Company is intended or shall be construed to give to any person, firm, or corporation other than the parties hereto and the holders of said bonds and coupons any legal or equitable right, remedy, or claim upon or by reason of said covenants, all of said covenants being intended to be and being for the sole and exclusive benefit of the parties hereto and of the holders of the bonds and coupons issued hereunder and secured hereby.

ARTICLE III

REDEMPTION OF BONDS

Section 1. While the Company is not in default in payment of any of the bonds or interest coupons secured hereby or in the payment of taxes or other governmental charges as herein provided or in any other of its covenants or agreements herein contained, it may, at its option, redeem any or all of the bonds at any time outstanding hereunder in advance of their maturity on any interest payment date, by paying, as to any bonds called for redemption at any time, the principal thereof and accrued interest thereon to the date fixed for such redemption and a premium of two per cent (2%) of said principal. The Company shall, not less than thirty-five (35) days before any date upon which the bonds shall be redeemed, notify the Trustee of the principal amount of bonds it desires to redeem, and, if the principal amount of the bonds to be redeemed be less than the total outstanding bonds, the Trustee shall choose by lot and notify the Company of the numbers of the bonds to be redeemed out of such maturity or maturities, as may be designated by the Company, and thereupon notice of such redemption shall be given by the Company to the holder or holders of the bonds so called for redemption, by advertisement to be published at least three (3) times prior to the date of such redemption, in a daily secular newspaper of general circulation, published in the English language in Chicago, Illinois, the date of the first publication of such notice in each case to be at least thirty (30) days before the date fixed for such redemption; and such notice shall state the date upon which the Company will be prepared to redeem such bonds and the numbers and maturities of the bonds so called for redemption and that, upon and after the date given in said notice and upon the deposit with the Trustee of moneys sufficient to pay said bonds and coupons and premium, all interest on the bonds so called for redemption shall cease. A copy of such notice shall also be mailed by the Company at least thirty (30) days prior to said redemption date to each holder of registered bonds at the address shown on the registry books. The Company covenants that, in the event it shall give such notice to the Trustee, it will deposit with the Trustee, before the date fixed for such redemption, money sufficient to make such redemption. If the Company shall give such notice to the Trustee and shall deposit money as aforesaid with the Trustee sufficient to pay said bonds and coupons so called for redemption and such premium and shall complete publication of the notice aforesaid, the bonds so called for redemption shall cease to draw interest from the date fixed for redemption, and such bonds and coupons shall be excluded from participation in the

lien of or any security afforded by this indenture, and the holders shall look for payment of such bonds and coupons only to the sums so deposited with the Trustee and in no event to the Company; but said sums so deposited shall be held by the Trustee (without any liability or obligation to pay interest thereon) to the credit and for the payment of said bonds and coupons so called for redemption and shall be paid by the Trustee to the holders thereof, upon presentation and surrender of said bonds, together with the coupons thereunto belonging and thereafter maturing; the registered owner of any registered bond shall also thereupon receipt to the Trustee for such payment.

Section 2. The Trustee may also apply any insurance moneys or other moneys received by it and which it is authorized, under any of the terms of this indenture, to use in redeeming bonds, toward the purchase of bonds in the open market at the lowest price obtainable less than the redemption price or toward the redemption of bonds drawn by it by lot in the manner, at the price, and upon the notice provided in Section 1 of this Article, and in such event the Trustee shall be entitled to give such notice on behalf of the Company, and no notice from the Company to the Trustee shall be required.

Section 3. The Company may also purchase in the open market any of the bonds issued hereunder and surrender the same to the Trustee for cancelation.

Section 4. All bonds redeemed or purchased under the provisions of this Article shall be canceled by the Trustee and surrendered to the Company and shall not be reissuable by the Company.

ARTICLE IV

PARTIAL RELEASES AND CONDEMNATION PROCEEDS

Section 1. While the Company shall be in possession of the property hereby mortgaged and conveyed and there shall be no existing default under this indenture, it is understood that the Company, without the consent of the Trustee, may from time to time sell, exchange, and, if of no substantial value to the Company in its business, otherwise dispose of, free of the lien hereof, any of the fixtures, apparatus, machinery, or equipment in the nature of real property or any part thereof upon the mortgaged premises or constituting part of the Trust Estate (but not the real estate above described or the building or improvements at any time thereon), which may have become worn out, damaged, unsuitable for, or unnecessary or no longer required in the Company's business, and in such event the consent of the Trustee or a release of such property shall not be necessary; provided, however, that no such fixtures, apparatus, machinery, or equipment having a

value of more than Ten Thousand Dollars ($10,000) shall be so sold, exchanged, or otherwise disposed of at any one time or in any one transaction, without the prior written consent of the Trustee, which such consent the Trustee, in its discretion, may give. Upon each such sale, exchange, or other disposition, the Company shall furnish to the Trustee a resolution of its Board of Directors, certified as such by its Secretary or Assistant Secretary and under its corporate seal, setting forth that such fixtures, apparatus, machinery, or equipment so sold, exchanged, or otherwise disposed of (describing the same), have become worn out, damaged, unsuitable for, or unnecessary or no longer required in the Company's business.

Section 2. All moneys, received as compensation (after deducting the amount of any special assessment levied and assessed against the mortgaged premises on account of benefits from any improvement in connection with such taking or damaging) for any property taken or damaged by the exercise of the right of eminent domain, shall be paid to the Trustee to be applied by the Trustee to redeem outstanding bonds hereunder or with the consent of the Trustee upon request of the Company (evidenced by certified copies of resolutions of its Board of Directors) to reinvestment in other property, which shall become subject or shall be forthwith subjected to the prior lien of this indenture or to the extent requested by the Company and consented to by the Trustee, to both such purposes.

Section 3. In event of application of any moneys received under this Article toward the redemption of outstanding bonds, the moneys so received shall be applicable toward payment of the principal and premium on bonds to be redeemed, and the Company covenants and agrees, on demand of the Trustee, to pay over to the Trustee the amount of accrued interest on such bonds so redeemed.

ARTICLE V

POSSESSION UNTIL DEFAULT—DEFEASANCE

Section 1. Until default shall have been made, in the due and punctual payment of the interest or of the principal of the bonds hereby secured or of some part of such interest or principal or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the Company, and until such default shall have continued beyond the period of grace, if any, in this indenture provided in respect thereof, the Company and its successors and assigns shall be suffered and permitted to retain actual possession of all of the property subject to the lien of this indenture (other than cash held by the Trustee hereunder) and to manage, operate, and use the

same and every part thereof and to collect, receive, take, use, and enjoy the earnings, income, rents, issues, and profits thereof.

Section 2. If the Company and its successors or assigns shall pay or cause to be paid the whole amount of the principal and interest (and premiums, if any) due upon all such bonds and appurtenant coupons then outstanding, or shall provide for such payment by depositing with the Trustee the entire amount due thereon for principal and interest (and premiums, if any) and shall also pay or cause to be paid or likewise provided for all other sums, payable hereunder by said Company, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of this indenture, then and in that case all property and other rights and interests, hereby conveyed or assigned or pledged and then subject hereto, shall revert to the Company according to its interest, and the estate, right, title, and interest of the Trustee hereunder in respect thereof shall thereupon cease, determine, and become void, and in such case the Trustee, on demand of the Company, its successors, or assigns and at its or their cost and expense, shall cancel and satisfy this indenture and shall execute and deliver to the Company such instruments as may be necessary or proper to release and discharge of record this indenture and shall also execute and deliver any and all proper instruments necessary to revest the then Trust Estate in the Company, according to its interests, free from the lien hereof; otherwise, this indenture shall continue and remain in full force and effect.

ARTICLE VI

BONDHOLDERS' POWERS, ACTS, HOLDINGS, AND APPARENT AUTHORITY

Section 1. Any request, direction, or other instrument required by this indenture to be signed and executed by bondholders may be in any number of concurrent writings of similar tenor and may be signed or executed by such bondholders in person or by attorney appointed in writing. Proof of the execution of any such request, direction, or other instrument or of the writing appointing any such agent and of the ownership of unregistered bonds, if made in the following manner, shall, in the discretion of the Trustee, be sufficient for any purpose of this indenture and shall be conclusive in favor of the Trustee and of the Company, with regard to any action taken or suffered by them or either of them, under such instrument, to wit:

a. The fact and date of the execution by any person of any such writing may be proved by the certificate of any notary public

or other officer in any jurisdiction who, by the laws thereof, has power to take acknowledgments of deeds within said jurisdiction, that the person signing such writing did acknowledge before him the execution thereof;

b. The fact of the holding of any holder of bonds transferable by delivery and the amount and issue number of such bonds and the date of his holding the same may be proved by a certificate executed by any trust company, bank, bankers, or other depositary (wherever situated) if such certificate shall be deemed by the Trustee to be satisfactory, showing that at the date therein mentioned such person had on deposit with such trust company, bank, bankers, or other depositary the bonds described in such certificate;

c. The ownership of registered coupon bonds shall be proved by the registers of said bonds.

Section 2. From time to time, the holders of two-thirds, in principal amount, of all of the bonds hereby secured and at the time being outstanding, by their votes at a meeting of bondholders called by the Trustee on such notice as the Trustee deems sufficient or by an instrument or instruments in writing by such holders signed, shall have power with the written approval of the Trustee:

1. To assent to and authorize the release of any part of the property mentioned herein and conveyed to or held by the Trustee hereunder, under other terms than those herein expressed;

2. To assent to and authorize any modification or compromise of the rights hereunder, of the bondholders and of the Trustee against the Company or against any property subject to this indenture; and

3. To assent to and authorize any modification of the provisions of this indenture that shall be proposed by the Company and recommended by the Trustee;

Any action taken with the assent or authority given, as aforesaid, shall be binding upon the holders of all of the bonds hereby secured and upon the Trustee, as fully as though such action were specifically and expressly authorized by the terms and conditions of this indenture.

ARTICLE VII

RIGHTS AND REMEDIES IN EVENTS OF DEFAULT

Section 1. In case any one or more of the following events of default shall occur (hereinafter called "events of default"), that is to say:

a. Default shall be made in the due and punctual payment

of any interest on any bonds hereby secured and outstanding, when and as the same shall become payable as therein and herein expressed, and any such default shall continue for a period of thirty (30) days; or

b. Default shall be made in the payment of the principal of any of the bonds hereby secured, when the same shall become due and payable, whether at maturity or otherwise, and any such default shall continue for a period of thirty (30) days; or

c. Default shall be made in the due observance and performance of any other covenant or condition herein required to be kept or performed by the Company, and any such default shall continue for a period of thirty (30) days after written notice thereof to the Company from the trustee; or

d. A receiver of the Company or of its property shall have been appointed, and such appointment is not vacated or stayed within ninety (90) days; or

e. The Company shall become insolvent or be decreed a bankrupt or shall go into liquidation, either voluntarily or under an order of a court of competent jurisdiction, or shall make a general assignment for the benefit of creditors;

then, and in every such case, the Trustee, by notice in writing mailed to the Company, may and, upon the written request of the holders of at least one-fourth in principal amount of the bonds then issued and outstanding, shall declare the principal of all the bonds hereby secured and then outstanding to be due and payable immediately, and upon such declaration the said principal shall become forthwith due and payable immediately, anything in this indenture or in said bonds to the contrary notwithstanding.

Section 2. If any one or more of the aforesaid events of default shall happen, then, and in every such case, the Company, upon demand of the Trustee, shall and forthwith will surrender to the Trustee the actual possession of, and the Trustee shall be entitled forthwith, with or without process of law, to enter into and upon and take possession of all and singular the property hereby mortgaged and conveyed or intended so to be and each and every part thereof and all record books, papers, cash, and accounts of the Company and to exclude the Company and its agents and servants wholly therefrom; and shall have, hold, and use the same and may lease, from time to time, any part thereof or may control, manage, and operate, by its superintendents, managers, employees, agents, and attorneys, the said property, with its appurtenances, and continue the business and operation thereof, making from time to time at the expense of the Trust Estate all

advancements, repairs, replacements, and such additions, alterations, extensions, and improvements thereof and thereto as may become necessary or as, to the Trustee, may seem proper and judicious in the operation, preservation, or improvement of said property and may collect and receive all income, rents, issues, and profits of the same and every part thereof; and, after deducting the expenses of maintaining, managing, and operating said property and conducting the business thereof and of all advances, repairs, replacements, additions, alterations, extensions, and improvements so made and all payments made for taxes, levies, and assessments and other charges upon said property or any part thereof and incidental expenses, including interest on sums advanced and, as well, just compensation for the services of the Trustee, its superintendents, managers, employees, agents, attorneys, and counsel, shall apply the remainder of the money so received by it as follows: (a) in case the principal moneys, evidenced by all the outstanding bonds secured by this indenture, shall not have become due or have been declared due, to the payment of the principal and interest in default, pro rata, in order of the priority of the maturity of the instalments of such principal and interest; and (b) in case all of the outstanding bonds secured by this indenture shall have become due, by declaration of maturity or otherwise, then, to the payment of the principal and interest upon said bonds, pro rata, such payments to be made to the holders of said bonds, without any preference or priority whatever and without preference of interest over principal or of principal over interest. Upon payment in full of all principal and interest and other charges, payment of which is secured by this indenture and in default, the Trustee shall and, at any time prior thereto in its discretion, the Trustee may return possession of such mortgaged property to the Company and shall thereupon account to the Company for its management and operation thereof.

Section 3. In the event any one or more of the aforesaid events of default shall happen, then, in every such case, with or without declaring the principal of all bonds then outstanding to be immediately due and payable, the Trustee may and shall, upon the written request of the holders of at least one-fourth in principal amount of the bonds outstanding hereunder and upon being indemnified to its reasonable satisfaction, proceed to protect and enforce its rights and the rights of the bondholders under this indenture, by suit or suits, in equity or at law, in any court of competent jurisdiction, whether for specific performance of any covenant or agreement contained herein or in aid of the execution of any power herein granted or for any foreclosure hereof or hereunder or for the enforcement of such other appropriate legal or

equitable remedy as the Trustee may deem most effectual to protect and enforce the rights aforesaid.

Section 4. Upon the happening of an event of default or the declaration of maturity of all of the outstanding bonds by the Trustee and upon the filing of a bill in equity, or other commencement of judicial proceedings to enforce the rights of the Trustee and of the bondholders, the Trustee, upon three (3) days' written notice to the Company, as a matter of right and without regard to the then value of the Trust Estate or the solvency or insolvency of the Company, shall be entitled to the appointment of a receiver of the property hereby mortgaged and conveyed and of the rents, issues, and profits thereof, pending such proceedings, and, in case of foreclosure sale and the entry of a deficiency decree, during the full statutory period of redemption, with power to apply any amounts collected by such receiver as ordered by the court to payment of the items authorized to be paid in Section 5 of this Article, in case of a judicial sale, and with such other and additional powers as the court making such appointment shall confer.

Section 5. The proceeds of any judicial sale of the mortgaged premises and property or any part thereof shall be paid to the Trustee and by it applied as follows:

First. To the payment of all costs of the suit or suits wherein such sale may have been ordered, including all reasonable fees and expenses of the Trustee and of any receiver or receivers appointed therein, together with reasonable attorneys' and solicitors' fees of the Trustee and all costs of advertising, sale, and conveyance.

Second. To the payment of all other expenses of the trust hereby created, including all moneys advanced by the Trustee for taxes, tax deeds, assessments, abstracts, repairs, mechanics' and other liens, and insurance on the Trust Estate, with interest thereon at the highest rate permitted by law.

Third. To the payment of all the principal and interest of the bonds then outstanding and then due and payable, whether by declaration or otherwise, in full, if said proceeds be sufficient, but, if not, then pro rata, without preference or priority of any one bond over any other or of interest over principal or of principal over interest, subject, however, to the provisions of Section 8 of Article I of this indenture. The overplus of the purchase money, if any, shall then be paid to the Company or whosoever shall be lawfully entitled thereto.

Section 6. In case of any such judicial sale of the mortgaged property, any bondholder or bondholders or the Trustee may bid for and purchase said property and, upon compliance with the terms of

said sale, may hold, retain, possess, and dispose of such property, in its own absolute right, without further accountability and at any such sale any bondholder or bondholders or the Trustee so purchasing such property shall be entitled, for the purpose of making settlement or payment for the property purchased, to use and apply any bonds and any matured and unpaid coupons hereby secured, by presenting such bonds and coupons, in order that there may be credited thereon the sum apportionable and applicable thereto out of the net proceeds of such sale; and thereupon such purchaser shall be credited on account of such purchase price, payable by him, with the sum apportionable and applicable out of such net proceeds to the payment of or as credit on the bonds and coupons so presented.

Section 7. No remedy herein conferred upon or reserved to the Trustee or to the holders of bonds hereby secured is intended to be exclusive of any other remedy or remedies; but each and every remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute. No delay or omission to exercise any right or power accruing upon any default, continuing as aforesaid, shall impair any such right or power or shall be construed to be a waiver of any such default or acquiescence therein; and every such right and power may be exercised from time to time and as often as may be deemed expedient. In case the Trustee shall have proceeded to enforce any right under this indenture, by entry, foreclosure, or otherwise and such proceeding shall have been discontinued or abandoned, because of waiver or for any other reason, or shall have been determined adversely to the Trustee, then and in every such case the Company and the Trustee shall severally and respectively be restored to their former positions and rights hereunder in respect to the said property hereby conveyed, and all rights, remedies, and powers of the Trustee shall continue as though no such proceedings had been taken.

Section 8. It is hereby declared and agreed as a condition, upon which each successive holder of all or any of said bonds and all or any of the coupons for interest on said bonds receives and holds the same, that no holder or holders of any of said bonds or coupons shall have the right to institute any proceeding at law or in equity, of any character or kind, for the foreclosure of this indenture or for the execution of the trusts hereof or for the appointment of a receiver or for any other remedy, under this indenture or the lien hereby created or otherwise, without first giving notice in writing to the Trustee, of default having been made and continued as aforesaid, and unless the holders of at least one-fourth in principal amount of the then outstanding bonds have in writing notified and requested the Trustee, as above provided (and a

reasonable opportunity has been offered to the Trustee, for a period of not less than thirty (30) days after the receipt of such notice and request, to proceed and exercise the powers hereinbefore granted or to institute such action, suit, or proceeding), and without also having offered to the Trustee adequate security and indemnity against the costs, expenses, and liabilities to be by the Trustee incurred therein or thereby; and such notice, request, and offer of indemnity may be required by the Trustee, as conditions precedent to the execution of the powers and trusts of this indenture or to the institution of any suit, action, or proceeding at law or in equity for the foreclosure hereof, for the appointment of a receiver or for any other remedy hereunder or otherwise, in case of such default as aforesaid in the payment of the principal of any of said bonds, in the payment of any semi-annual instalments of the interest thereon or any other default hereunder by the Company, its successors, and assigns, respectively, or failure to perform any of the covenants or stipulations hereof, to be kept and performed on its part. And it is also agreed that no holder or holders of any of the said bonds or any of the said interest coupons intended to be hereby secured shall institute any suit, action, or proceeding at law or in equity, for the foreclosure hereof or for the appointment of a receiver or for the collection of any of the money evidenced by such bonds or coupons, otherwise than upon the terms and conditions and in the manner herein provided.

Section 9. The Company covenants that, if any one or more of the aforesaid events of default shall happen, then and in every such case, the Company will pay to the Trustee, upon demand, for the benefit of the holders of the bonds and coupons then outstanding hereunder, the whole amount which then shall have become due and payable (by declaration or otherwise) on all such bonds and coupons then outstanding, for interest or principal or both, as the case may be; and in case the Company shall fail to pay the same forthwith upon demand, the Trustee, in its own name and as Trustee of an express trust, shall be entitled to recover judgment against the Company for the whole amount so due and unpaid. In case of a sale of the property subject to this indenture and of the application of the proceeds of sale to the payment of the debt hereby secured, the Trustee, in its own name and as Trustee of an express trust shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid, upon any and all of the bonds and coupons then outstanding, for the benefit of the holders thereof and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest. Any moneys thus collected by the Trustee under this Section shall be applied by the Trustee, first, to the payment of the expenses,

disbursements, and compensation of the Trustee, its agents, and attorneys, and, second, toward payment of the amounts then due and unpaid upon the bonds and coupons in respect of which such moneys shall have been collected, ratably and without preference of interest over principal or of principal over interest but subject to the provisions of Section 8 of Article I of this indenture.

Section 10. In any suit or action by the Trustee, arising under this indenture, or on all or any of the bonds or coupons issued hereunder, the Trustee shall not be required to produce such bonds or coupons but shall be entitled in all things to conduct any such suit or action, without their production, as if it were the holder of any such outstanding bonds and coupons; and a certificate of the Trustee, purporting to be signed by any executive officer or other person in charge of the records of its bond or trust department and attested with its seal, as to the number, amount, denomination, and serial numbers of the bonds and coupons then outstanding, shall be and be held to be admissible as evidence of the facts therein recited and to be prima facie true and correct. The Trustee shall be deemed to be the representative of the bond and coupon holders in all suits or actions in connection with the trust estate or this indenture, and it shall not be necessary to make any such holders parties therein.

Section 11. Upon any foreclosure sale of the property hereby mortgaged and conveyed, the property shall be sold either as a whole or in parcels, at the option of the Trustee; and, if in parcels, the same may be divided as shall be considered for the best interests of the bondholders by the Trustee, in its sole discretion, and at the option of the Trustee may be offered first by parcels designated as above and then as a whole, that offer producing the highest price for the entire property to prevail, any law, statutory or otherwise, to the contrary notwithstanding.

Section 12. Upon any default by the Company in the payment of the principal, interest, or premium of any bonds duly called and presented for redemption in accordance with the provisions of Article III hereof, the Trustee and the holders of the bonds shall, respectively, have the same rights and remedies herein conferred in the case of a default in the payment of the principal of the bonds.

Section 13. At any time hereafter before full payment of the bonds and whenever it shall deem it expedient for the better protection or security of said bonds (although none of the events of default shall have then happened), the Company, with the consent of the Trustee, may surrender and deliver to the Trustee full possession of the whole or any part of the Trust Estate. In such event, the Trustee shall enter into and upon the premises and property so surrendered and deliv-

ered and shall take and receive possession thereof for such period, fixed or indefinite, as aforesaid, without prejudice, however, to its rights at any time subsequently, when entitled thereto by any provision hereof, to insist upon maintaining and to maintain such possession, though beyond the expiration of such prescribed period; and the Trustee, from the time of its entry upon such premises and property, shall maintain, use, manage, control, and employ the same in accordance with the provisions of this indenture and shall receive and apply the income and revenues thereof, as provided in Section 2 of this Article. Upon the application of the Trustee and with the consent of the Company, if none of the events of default, as hereinbefore defined, shall have happened and be continuing, and without such consent, if one or more of said events of default shall have happened and be continuing, a receiver may be appointed to take possession of and to operate, maintain, and manage the whole or any part of the Trust Estate, and the Company shall transfer and deliver to such receiver all such property, wheresoever the same may be situated; and, in every case when the receiver of the whole or any part of the Trust Estate shall be appointed under this Section or otherwise, the net income and profits therefrom shall be paid over to and shall be received by the Trustee for the benefit of the holders of the bonds and shall be applied by the Trustee, as prescribed in Section 2 of this Article.

Section 14. Each of the bonds is and will be issued upon the express condition, to which each successive holder thereof expressly assents by receiving the same and agrees, that no recourse under or upon any obligation, covenant, or agreement contained in said bonds or coupons or in this indenture or arising out of or because of the indebtedness evidenced by such bonds or coupons, shall be had against any incorporator, subscriber to capital stock, or past, present, or future stockholder, officer, or director of the Company, either directly or through the Company or through any receiver, assignee, or trustee in bankruptcy or by any legal or equitable proceedings, whether for liability on stock subscriptions or stockholders' liability or any other liability or penalty, it being expressly understood and agreed that this indenture and the bonds and coupons issued hereunder are solely corporate obligations and that any and all personal liability, of every name and nature, against any incorporator, subscriber, or past, present, or future stockholder, officer, or director of the Company, whether arising at common law or in equity or created or to be created by statute or constitution, are hereby expressly released and waived as a condition of and as a part of the consideration for the execution of this indenture and the issue of the bonds and coupons hereby authorized.

Section 15. If, at any time after the happening of an event of default, either before or after the principal of the outstanding bonds has become due and payable by declaration of maturity as hereinbefore authorized and/or proceedings have been taken to enforce this indenture or said bonds by foreclosure or otherwise, all arrears of interest upon said bonds and all principal upon bonds, past due by lapse of time and not by declaration, together with all other payments required to be made by the Company hereunder, including all expenses and reasonable charges of the Trustee and all advances made by the Trustee or by the bondholders hereunder, in accordance with the terms and provisions of this indenture, shall, prior to the entry of any decree for the foreclosure of this indenture, be paid by the Company, then and in every such case the Trustee may, in its discretion, and shall, upon the written request of the holders of at least fifty per cent (50%) in principal amount of the bonds secured hereby and then outstanding, waive such defaults and their consequences; but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereon. The privilege granted by this action shall be a continuing privilege as often as the occasion arises and shall not be exhausted by one or more users thereof.

ARTICLE VIII

CONCERNING THE TRUSTEE

Section 1. The Trustee accepts the trusts of this indenture upon the following terms and conditions, to which the parties and the holders of said bonds and coupons agree:

1. The Trustee shall be under no obligation to see to the filing or registration or recording of this indenture or any indenture supplemental thereto and may authenticate and deliver the bonds to be issued hereunder in accordance with the provisions hereof prior to the filing, registration, or recording of this indenture.

2. The Trustee shall be entitled to reasonable compensation for all services rendered in the execution of the trusts hereby created and may employ agents and attorneys and counsel in the execution of said trusts; and the compensation of the Trustee, as well as the reasonable compensation of its attorneys and counsel and of such persons as it may employ in the administration or management of the trusts hereunder and all other reasonable expenses, necessarily incurred or actually disbursed hereunder, the

Company agrees to pay to said Trustee on demand, and, for such payment, the Trustee shall have a lien on the Trust Estate and on all funds in the hands of the Trustee, in priority to the rights and claims of the holders of said bonds and coupons.

3. The Trustee shall not be responsible in any manner

a. For the validity, execution, acknowledgment, filing, registration, or recordation of this indenture or any indenture supplemental thereto

b. For any recitals, covenants, or agreements in said bonds or herein contained

c. For the amount, value, or description of the security covered hereby or for the fixing, preservation, or continuance thereon of the lien hereof

d. For the use or application of the bonds or their proceeds

e. For anything done by it in connection with this trust except its own wilful misconduct or negligence

f. For the consequence of any act done in good faith

g. For any action taken by the Trustee in accordance with the opinion of attorneys and counsel employed by the Trustee

4. The Trustee shall be under no obligation to keep itself advised or informed as to whether or not the Company is in default under any of the terms or conditions of this indenture; and, unless and until the Trustee shall have received written notice to the contrary from the holder or holders of five per cent (5%) in principal amount or more of the bonds then outstanding hereunder, the Trustee may for all purposes of this indenture assume that the Company is not in default hereunder and that none of the events, hereinbefore denominated events of default, have happened. The Trustee shall not be obligated to (but may) make any demand or request herein provided for or to make any determination or investigation or to take any action, herein provided for, unless requested so to do by holders of five per cent (5%) in principal amount or more of the bonds then outstanding and unless indemnified to the Trustee's satisfaction against all costs, expenses, and liability on account of taking such action.

5. The Trustee shall not be required to appear in or defend any suit which may be brought against it, respecting the Trust Estate, or by reason of its being Trustee hereunder or to institute any suit or proceeding to enforce any covenant or remedy herein provided or take any action toward the execution or enforcement

of the trusts hereby created, which, in the opinion of the Trustee, will be likely to involve the Trustee in expense or liability, or to foreclose this indenture, unless the holders of said bonds or some of them shall, as often as required by the Trustee, furnish the Trustee with reasonable security and indemnity against such expense or liability.

6. The Trustee shall be fully protected in acting upon or in accordance with any notice or request, consent, certificate, demand, resolution, or other instrument or document believed by the Trustee to be genuine and to have been signed or authorized or executed or certified or sealed by the proper person or persons, and no liability shall be imposed upon said Trustee on account of the nonexecution or defective execution of any instrument or document so believed by the Trustee to have been properly executed; and the Trustee is authorized to accept the certificate of the Secretary or an Assistant Secretary of the Company, under its corporate seal, to any resolution of the Board of Directors or stockholders of the Company as conclusive evidence that such resolution was duly and lawfully adopted and is binding upon the Company.

7. The Trustee shall not be liable or responsible for permitting the Company, its agents, or servants, to retain or be in possession or to manage any of the property herein mentioned, nor shall the Trustee be responsible for any destruction, deterioration, loss, injury, or damage of or to any of said property caused by the Company, its servants, or agents or by any person whomsoever, and the Trustee shall not be in any way liable for the consequence of any breach on the part of said Company of any of the covenants herein contained or for any act or thing hereunder, except its own wilful misconduct or negligence.

Section 2. As to the existence or nonexistence of any fact, the Trustee, unless hereinbefore otherwise expressly stated, shall be entitled to rely upon the certificate of the Company signed and verified by its President or a Vice President and by its Treasurer or an Assistant Treasurer, as sufficient evidence of the facts therein stated, and shall also be at liberty to accept a similar certificate to the effect that any particular dealing, transaction, or action is necessary or expedient; but the Trustee may, in its discretion and at the reasonable expense of the Company, in every case, secure such further evidence as it may think necessary or advisable but shall in no case be bound to secure the same; and the Trustee may, in relation to any powers or duties imposed upon it by this indenture, act upon the opinion or advice of any attorney, valuer, surveyor, engineer, accountant, or other expert,

whether retained by the Trustee or the Company, and shall not be responsible for any loss resulting from any action or nonaction, in accordance with any such opinion or advice.

Section 3. The Trustee, in any capacity other than as Trustee hereunder, may from time to time hold, buy, sell, and deal in any of the bonds or coupons issued hereunder and secured hereby and assert its rights in the same manner as any other bond or coupon holder hereunder, as if said Trustee were not Trustee hereunder.

ARTICLE IX

RESIGNATION OR SUBSTITUTION OF TRUSTEE

Section 1. The Trustee or any successor in trust, hereafter appointed, may resign or discharge itself from the trust created by this indenture, upon giving notice to the Company and to the bondholders, of such proposed resignation and specifying the date when such resignation shall take effect, which notice shall be given by publication once a week for at least three weeks prior to the date when such resignation shall take effect, in a daily newspaper published in the English language in the City of Chicago, in the State of Illinois, a copy of which notice shall be mailed to all the registered holders of said bonds and to the Company. Such resignation shall take effect upon the date specified in such notice, unless previously a successor Trustee shall be appointed as herein provided, in which event such resignation shall take effect immediately upon the appointment of such successor Trustee.

Section 2. In event that the Trustee at any time merges or consolidates with another corporation, the corporation resulting from such merger or consolidation shall thereupon become and be the Trustee hereunder, as the case may be, without the execution or filing or recording of any instrument and without any action on the part of the Company or the holders of bonds hereunder, anything herein contained to the contrary notwithstanding.

Section 3. In case at any time the Trustee shall resign or shall become incapable of acting, a successor may be appointed by the holders of at least fifty per cent (50%) in principal amount of all the bonds hereby secured and then outstanding, by an instrument or instruments signed by such bondholders; but, until any Trustee shall be appointed by the bondholders as herein authorized, the Company, by an instrument executed by the order of its Board of Directors, may appoint a Trustee ad interim, to fill such vacancy; provided, however, that every such Trustee appointed by the Company or the bondholders shall always be a trust company having its principal place of business in the

City of Chicago, Illinois, and having a capital and surplus of not less than One Million Dollars ($1,000,000) and authorized to execute the trusts created by this indenture.

Section 4. Any successor Trustee appointed hereunder shall execute, acknowledge, and deliver to the Company and to its predecessor an instrument accepting such appointment hereunder, and thereupon, upon the execution and filing for record of the same in the public recording offices where this indenture shall have been recorded, such successor Trustee, without any further act or deeds of conveyance, shall become invested with all the assets, powers (including discretionary powers), rights, duties, trusts, and obligations of its predecessor in trust hereunder, with like effect as if originally named as Trustee herein; but, nevertheless, on a written request of the successor Trustee, the Trustee ceasing to act shall execute and deliver an instrument transferring to such successor Trustee, upon the trusts herein expressed, all the assets, properties, rights, powers, and trusts of the Trustee so resigning or removed or becoming incapable of acting, subject, notwithstanding, to any lien which the retiring Trustee may have pursuant to any provision hereunder; and, upon request in writing of any successor Trustee, the Company shall make, execute, acknowledge, and deliver any and all deeds, conveyances, assignments, or instruments in writing for more fully and certainly vesting in and confirming to the said successor Trustee such assets, property, rights, powers, and duties.

Section 5. The said Institute Trust and Savings Bank may, in like manner as hereinbefore provided in its capacity as Trustee, resign or discharge itself of the duties herein imposed upon it as Registrar and as banker, for the purpose of handling, receiving, or paying funds hereunder, in which case a successor or successors to such duties and authority shall be appointed, in like manner as herein provided for the appointment of a successor Trustee—it being intended and understood that said Institute Trust and Savings Bank shall act hereunder in several distinct capacities—to wit: As a Trustee, with the duties, rights, authority, and powers in this indenture imposed and conferred; and as Authenticating Agent, Registrar, and as banker as aforesaid, independent of any duties, obligations, or authority as Trustee.

ARTICLE X

INTERPRETATION AND SUNDRY PROVISIONS

Section 1. In case any one or more of the provisions of this indenture or of the bonds or coupons secured hereby shall, for any rea-

son, be held to be illegal or invalid, such illegality or invalidity shall not affect any other provision of this indenture or of said bonds or coupons, but this indenture and said bonds and coupons shall be construed and enforced as if such illegal or invalid provision or provisions had never been contained therein.

Section 2. Where any instrument is required or permitted to be executed under the terms of this indenture by any persons who are holders or owners of any bonds or coupons, such instrument may be executed in as many different counterparts as may be necessary or convenient, and all such counterparts shall be taken as constituting a single instrument joined in by the persons executing such counterparts for all the purposes of this indenture.

Section 3. All the covenants, statements, promises, and agreements in this indenture contained by and on behalf of the Company shall bind and inure to the benefit of its successors and assigns, whether so specified or not. For all purposes of this indenture, including the execution, issue, and use of any of the bonds or coupons hereby secured, the term "Company" includes and means not only the first party hereto but also its successors and assigns.

Section 4. Wherever the word "Trustee" appears in this indenture, it shall be held to mean Institute Trust and Savings Bank, the existing Illinois corporation of that name, or any corporate successor for the time being of said Institute Trust and Savings Bank. Wherever the words "bond" or "bonds" appear in this indenture, they shall (unless the context otherwise indicates) be held and construed to mean a bond or bonds issued under and secured by this indenture. Wherever the term "event of default" occurs in this indenture, it shall be held and construed to mean an event of default as defined in Section 1 of Article VII of this indenture.

Section 5. Whenever any notice is required to be given to the Company under any of the provisions of this indenture, it shall be deemed sufficiently given if mailed to the Company at Chicago, Illinois, or such other address as the Company may from time to time file with the Trustee for such purpose.

Section 6. In order to facilitate the recording and filing of this indenture, it may be executed simultaneously in any number of counterparts, each of which shall be deemed an original, and they shall together constitute but one and the same instrument.

Section 7. Institute Trust and Savings Bank hereby accepts the trusts herein and hereby created and agrees to perform the same, all upon the terms and conditions hereinbefore set forth.

IN WITNESS WHEREOF, the said Playground Company of Illinois and the said Institute Trust and Savings Bank have caused this indenture to be executed in their respective corporate names, by their respective and proper corporate officers thereunto duly authorized, and their respective corporate seals to be hereunto affixed and attested, and this indenture has been signed, sealed, and delivered in the presence of witnesses all as of the day and year first above written.

Executed in three (3) counterparts.

PLAYGROUND COMPANY OF ILLINOIS
By GEORGE J. GROOP
Its President

(Corporate Seal)
Attest:
WILFRED WREN
Its Assistant Secretary

Signed, sealed, acknowledged, and delivered by Playground Company of Illinois in the presence of:
JOHN BURNS
HENRY S. GOODE

INSTITUTE TRUST AND SAVINGS BANK
By WILLIAM S. POPE
Its Vice President

(Corporate Seal)
Attest:
ALFRED L. WRIGHT
Its Assistant Secretary

Signed, sealed, acknowledged, and delivered by Institute Trust and Savings Bank in the presence of:
JOHN BURNS
WALTER R. PICKENS

Three Hundred and Seventy-five Dollars ($375) of U. S. Internal Revenue Stamps, representing the tax on said series of bonds, have been affixed to an executed original of said Trust Deed, in the possession of the Trustee, and canceled.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

I, Richard M. Miller, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that George J.

Groop, personally known to me to be the President of Playground Company of Illinois, a New Jersey corporation, and Wilfred Wren, personally known to me to be Assistant Secretary of said corporation, whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed and delivered the said instrument as President and Assistant Secretary, respectively, of the said Playground Company of Illinois and caused the corporate seal of said corporation to be affixed thereto, pursuant to authority given by the Board of Directors of said corporation, as their free and voluntary act and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and Notarial Seal this fourth day of April, 1927.

My commission expires September 1, 1930.

RICHARD M. MILLER

(Notarial Seal) Notary Public in and for the County and State aforesaid

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

I, Anthony D. Phipps, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that William S. Pope, personally known to me to be a Vice President of Institute Trust and Savings Bank, an Illinois corporation, and Alfred L. Wright, personally known to me to be an Assistant Secretary of said Bank, whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they signed and delivered the said instrument as Vice President and Assistant Secretary, respectively, of said Bank, and caused the corporate seal of said Bank to be affixed thereto by authority of its Board of Directors, as their free and voluntary act and as the free and voluntary act and deed of said Bank, for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and Notarial Seal this fourth day of April, 1927.

My commission expires August 13, 1927.

ANTHONY D. PHIPPS

(Notarial Seal) Notary Public in and for the County and State aforesaid

It is impossible to present a mortgage—or trust deed in the nature of a mortgage—that will cover all situations that may arise in connection with cor-

porate financing. The foregoing mortgage is a fair example of a complete but simple corporate obligation. The obligations issued thereunder are secured by real estate. As already stated in the text, some obligations are secured by collateral; in such cases, specific or general descriptions of the collateral to be held by the trustees should be used in mortgage forms, in lieu of the real estate description contained in the indenture here used. Some obligations are not specifically secured by pledge of property, real or personal, with the trustee, but are notes of the obligor issued under an indenture which restricts the actions of the obligor, such as a covenant to maintain a ratio between assets and liabilities or to refrain from paying dividends unless the earnings shall have exceeded a certain amount.

CONSTRUCTION BONDS.—A recent form of security offered for many bonds has been land and the buildings to be erected thereon. In such cases, the standard indenture should contain a covenant on the part of the obligor to erect and complete the proposed building within a definite time. Such bonds are called "construction bonds," and in some states the law requires that the term "construction bond" shall be printed on the face thereof. An example of such a covenant is as follows:

(Form of Construction Bond Covenant)

ARTICLE .....

CONSTRUCTION AND COMPLETION OF BUILDING

Section 1. The Company further covenants and agrees that within eighteen months from the date hereof, it will complete the

construction and erection upon the mortgaged real estate hereinbefore specifically described and conveyed, in accordance with plans and specifications prepared by A. B. Cross, Architect, of Chicago, Illinois, (copies of which plans and specifications have been identified and deposited with the Trustee) and in accordance with such further plans and specifications, if any, as may be approved by the Company and the Trustee, of a stone and brick reinforced concrete, and steel apartment building now in course of construction thereon, nine stories and basement in height, containing at least thirty apartments and with a volume of approximately 3,472,323 cubic feet; provided, however, that the time within which the Company is required to complete the construction of said building as aforesaid shall be extended in so far as it shall be actually delayed or hindered by strikes, riots, fire, acts of God or the public enemy, or other conditions arising without the fault of the Company.

Section 2. The Company expressly covenants and agrees to pay in full all indebtedness contracted or incurred in connection with the erection and construction of said building, and if the Company shall for any reason abandon or unreasonably delay the construction of said building, or should the Company for any cause whatsoever fail to complete said building or be prevented from completing the same, then the Trustee at its election (but without prejudice to any other right of the Trustee or of the bondholders arising in consequence of such default) may complete the construction of said building, and for that purpose the Trustee, in its own name or in the name of the Company, as its attorney-in-fact hereby irrevocably appointed for such purpose, may make, execute, and deliver any and all necessary contracts with architects, contractors, or other persons for work, labor, or materials for said building, and pay all necessary indebtedness therefor. The Trustee may at any time pay and discharge any outstanding bills for any indebtedness contracted or incurred by the Company in connection with said building, provided the Trustee finds said bills are just and correct, and the Trustee may advance all funds which may be necessary to complete said building irrespective of whether or not any claims for mechanics' liens shall have been filed against said premises or the building thereon. The Company expressly covenants and agrees to repay to the Trustee, on demand, any sums advanced or paid by it in accordance with the foregoing provisions, and any and all sums so advanced and paid by the Trustee shall be deemed a charge upon said premises to the same extent and with the same effect in all respects as herein provided with reference to other advances which may be made by the Trustee or bondholders hereunder for taxes, special

assessments, claims, liens, or other charges. The Trustee, as such attorney-in-fact for the Company, may at any time apply to the payment of any such bills for indebtedness contracted or incurred by the Company or by the Trustee in its behalf, in and about the completion of said building, all or any part of any funds to which the Company might otherwise be entitled under or by virtue of any contract or agreement relating to said building or premises, and the Company expressly covenants to repay to the Trustee, on demand, any deficit remaining after the application of said funds to the payment of any and all indebtedness incurred in completing the construction and erection of said building.

PROVISIONS FOR EXCHANGE OF BONDS.—The denominations of the bonds to be issued are set forth in the mortgage indenture. When the bonds are offered for sale, they may find a ready sale among large investors who desire $1,000 pieces, or they may find a ready sale among small investors who demand $500 or $100 pieces. In any case, the underwriters find themselves unable to meet the requirements of the market, and unless the bonds can be exchanged the underwriters are unable to grant the demands of their clients. To cover this situation, provisions are being inserted in mortgage indentures authorizing the interchange of denominations; *i.e.*, pieces of large denomination may be presented in exchange for those of smaller denominations, or those of small denomination may be surrendered and large pieces received. A typical provision of this kind is as follows:

> The holder of any bond, whether definitive or temporary, may present the same together with any unmatured coupons belonging thereto, to the Trustee at any time for cancelation and shall be entitled to receive in exchange therefor, without cost to said holder, a like aggregate principal amount of bonds

of any denomination or denominations which may be issued hereunder. The Company covenants from time to time, upon request of the Trustee, to execute and deliver to it such bonds in quantities and denominations requisite to effectuate such exchange and to pay to the Trustee its reasonable charges for making such exchange.

PROVISIONS REGARDING MATURITY.—Corporate obligations may mature serially, that is, in a fixed amount per year, or a particular issue may have only one maturity. It is sometimes considered wise not to have a series of fixed maturities, which might embarrass the obligor in the event of a business depression, but to provide that all of the bonds shall mature at one time and that the obligor shall pay to the trustee a certain percentage of its earnings each year, to be used for the retirement of bonds. Such a sinking fund provides for the gradual retirement of the bonds, and it increases the security; but it does not embarrass the obligor, nor does it cause a possible default by requiring that a fixed obligation be met in a poor year. A typical provision of this kind is as follows:

(Form of Sinking Fund Provision)

ARTICLE .....
SINKING FUND

Section 1. The Company covenants, in order to provide for the purchase and redemption of the bonds from time to time outstanding hereunder, that it will establish a special trust fund to be known as Sinking Fund and to be computed and used in the manner hereinafter specified.

Section 2. The Company covenants that it will, on or before the first day of April 1925, and on or before the first day of April in each year thereafter, while any bonds issued hereunder shall remain outstanding and unpaid, deposit with the Trustee (a) cash; or (b) cash and/or bonds issued hereunder taken at par, equal to twenty (20%)

per cent of the net earnings of the Company for the then preceding calendar year. The term "net earnings" as used in this Section shall mean the gross earnings from the operation of the business and plants of the Company after deducting therefrom all operating expenses, interest accrued upon the bonds issued hereunder, rentals accrued, insurance, reasonable expenditures for maintenance and renewals, proper reserves for federal and state taxes, and obsolescence and depreciation charges, which obsolescence and depreciation charges shall, for the purposes in this Section expressed, not exceed four (4%) per cent. All bonds so deposited with the Trustee shall be by the Trustee canceled and delivered to the Treasurer of the Company or upon his written order.

Section 3. That said Sinking Fund shall be held by the Trustee as part of the mortgaged property and cash therein deposited shall be paid out and applied by it from time to time (1) upon checks or drafts drawn by the Company for the purchase of bonds hereby secured, in the open market at or below the then redemption price during the period expiring forty-five (45) days prior to the then following interest payment date, and (2) if not entirely used for such purpose for the payment and redemption of bonds pursuant to the provisions of Article V on the then next interest payment date to an extent sufficient to exhaust, so nearly as may be, said funds.

A sinking fund provision is also used whenever bonds are secured by property that is subject to depletion, such as mines or timber land. In these cases, the respective companies covenant to deposit a certain sum per ton or per thousand feet of timber cut, to be used for the retirement of bonds.

The sinking funds mentioned above may be used in indentures whenever the obligations mature serially. The serial maturities are met, and in addition thereto the obligor retires additional bonds through the sinking fund.

ESCROW BONDS AND OPEN END INDENTURES.—At the time a loan is negotiated, the obligor may have sufficient property to justify

only a certain size of loan; but, knowing that in the future it will require additional funds, it desires to anticipate its future needs, without having to refinance at the time the need for the money arises. Such a contingency may be provided for by escrow bonds or by an open end indenture. In the case of the escrow bonds, the total amount to be issued is fixed; but it is provided that only a certain amount may be issued immediately and that the balance is to be certified and delivered by the trustee when the obligor has complied with certain conditions. In the case of the open end indenture, the amount of the obligation is not fixed; but it is provided that the obligor may issue bonds without limit, provided certain conditions as to earnings and acquirement of additional properties are met. These forms of indentures, particularly the second, are being used extensively by public service corporations whose operations are constantly expanding.

The following is an example of an article relating to escrow bonds:

(Form Used in Relation to Escrow Bonds)

ARTICLE .....

ISSUE OF BONDS

Section 1. Four million ($4,000,000) dollars in aggregate principal amount of said bonds, substantially in the form and substance hereinbefore recited, and of such of the denominations hereinbefore mentioned as shall be requested in the order for authentication thereof, shall forthwith be executed by the Corporation and delivered to the Trustee for authentication and the Trustee shall forthwith upon the written order of the Corporation, signed by its President or Vice President, authenticate and deliver the same to any party or parties designated

in said order, without the necessity for any further action on the part of the Corporation or for the prior recording or filing of this indenture, and without any obligation on the part of the Trustee to see to the use or application of the said bonds or their proceeds.

Section 2. The balance of the bonds to be issued under and secured hereby amounting to two million ($2,000,000) dollars aggregate principal amount may be executed by the Corporation from time to time (but not prior to January 1, 1927) and delivered to the Trustee, and thereupon shall be authenticated and delivered by the Trustee to or upon the written order of the Corporation, signed by its President or a Vice President, and by its Treasurer or an Assistant Treasurer for any or all of the following purposes and subject to the conditions in this Section contained, to wit:

A. For the acquisition (either simultaneously with or prior to the authentication of such bonds) by construction, purchase, or otherwise in fee and free from all incumbrances prior to the lien hereof of permanent or fixed additions to the plants and properties of the Corporation, or additional property of a fixed or permanent nature, which in the opinion of the Board of Directors are useful or advantageous to the Corporation in the conduct of its business.

B. For the acquisition by construction, purchase, or otherwise of fully drilled and equipped oil wells and gas wells, when such wells have been completed and proven to be productive, including leases, rights of way, and easements, appertaining to said wells, or any of them, and the necessary pipe lines connecting such wells with the main pipe lines of the Corporation provided, however, that such acquisitions are useful or advantageous to the Corporation in the conduct of its business and are acquired by the Corporation free of all incumbrances other than the lien hereof and any farm mortgages, as defined below, upon the real estate to which the said leases, rights of way, and easements may relate. The Corporation shall be deemed to have acquired such wells when it shall have acquired contracts or leases under which the Corporation has the right to purchase the entire gas and/or oil production of such well. Amounts paid as rentals or royalties or similar periodical payments under such leases or contracts shall not be included in determining the cost of such wells.

C. For the purpose of acquiring by construction, purchase, or otherwise, renewals and replacements to any of the mortgaged property to the extent that the cost or fair value, whichever is less, of such renewals or replacements exceed the fair value of the property renewed or replaced at the date of the execution and delivery of this indenture if owned by the Corporation at said date

or if acquired thereafter, the cost or fair value, whichever is less, of said property at the date of such acquisition.

Provided, however, that such bonds shall be authenticated and delivered by the Trustee under this Section only to the extent of sixty-five (65%) per cent of the fair value or the cost to the Corporation of such acquisitions, whichever may be less, and further provided that no bonds shall be so authenticated and delivered unless the net earnings of the Corporation, as hereinafter defined, during a period of twelve consecutive calendar months within the fifteen consecutive calendar months next preceding the authentication of the said bonds shall have equalled at least three (3) times the annual interest charges upon all the bonds issued and outstanding hereunder, plus those requested to be authenticated and delivered, and shall have at least equalled the aggregate of such interest charges plus the annual charges payable pursuant to the provisions of Subparagraphs 1 and 2 of Section 2 of Article . . . hereof. Said respective ratios of values and of earnings shall be established and confirmed by the showings responsive to the following Subparagraphs a, b, and c.

Before authenticating and delivering any bonds in accordance with this Section the Trustee shall receive the following:

a. A copy of a resolution of the Board of Directors of the Corporation certified by the Secretary or Assistant Secretary under its corporate seal to have been duly adopted by the said board

1. Authorizing the acquisitions by the Corporation provided for in this Section and for which bonds may be issued and which are to be used as the basis therefor

2. Stating that the said acquisitions are useful or advantageous to the Corporation in the conduct of its business, and are of the character set forth in Paragraphs A, B, or C above

3. Authorizing the execution and issue of the bonds to be authenticated and delivered, and requesting the authentication and delivery thereof, and stating the denominations in which said bonds shall be issued

4. Directing the creation of a sinking fund in accordance with Article . . . of this indenture

b. An affidavit under oath of the President or a Vice President and the Treasurer or an Assistant Treasurer of the Corporation setting forth:

1. A brief description of the acquisitions mentioned in the resolutions of the Board of Directors above referred to and setting forth the actual cost thereof to the Corporation, which may be either the amount actually expended therefor or the amount for which the Corporation is unconditionally obligated,

and which in the case of renewals or replacements shall be the actual cost of the pertinent excess as contemplated in Paragraph C of this Section. Whenever any of the acquisitions mentioned in Paragraphs A, B, and/or C of this Section are by way of construction, such affidavit shall state that such construction has been fully completed.

2. A statement in reasonable detail of the following items covering the period of twelve consecutive calendar months during the fifteen consecutive calendar months next preceding the authentication of the bonds requested:

aa. Such part of the gross receipts of the Corporation, from whatsoever source derived, as constitute gross earnings determined in accordance with properly established accounting practice

bb. Operating expenses, maintenance and repairs, taxes (except federal and state income taxes and special assessments, if any), rentals, royalties, and such other items as may be required to be deducted by any law or regulation of any governmental authority to which the Corporation may be subject, but excluding from such deductions depreciation and depletion. Drilling expenses on gas or oil leases shall be deemed operating expenses

cc. Net earnings of the Corporation, the same being hereby defined as the sum ascertained by subtracting item bb from item aa

(For the calendar year ...., the items of income and expense pertaining to the operation of the mortgaged property for the part of such year prior to the execution hereof shall be included and deemed items of income and of expense of the Corporation, even though such property was owned and operated by predecessor corporations.)

3. That none of such additions was acquired in exchange or substitution for or out of the proceeds of any of the mortgaged property, or out of any insurance moneys, or has been used as the basis for any previous authentication of bonds hereunder, and that all such acquisitions have been acquired subsequently to the execution and delivery of this indenture; and that no default exists under this indenture.

c. A statement by competent engineers or appraisers selected by the Corporation and approved by the Trustee (who may be at the time or have been previously in the employ of the Corporation) of the fair value of the acquisitions mentioned in the resolutions above referred to, (which, if such acquisitions consist of renewals and

replacements, shall be the fair value of the excess as contemplated in Paragraph C of this Section) and that from an engineering standpoint such acquisitions are advisable

d. An opinion of counsel selected by the Corporation and satisfactory to the Trustee (who may be counsel for the Corporation), to the effect that

1. The said bonds requested to be authenticated and delivered have been duly authorized by the Corporation in conformity with the provisions of this indenture, and have been authorized by all governmental authorities, if any, having power or authority over the issuance of bonds hereunder or the subjection of the properties of the Corporation to liens, and that said bonds constitute the legal and binding obligations of the Corporation.

2. The acquisitions mentioned in the resolutions of the Board of Directors above referred to, have been actually made by the Corporation either prior to or contemporaneously with the issue of the said bonds.

3. Good and valid title to such acquisition has, prior to such authentication or contemporaneously therewith, been vested in the Corporation, and that this indenture has been constituted a first and valid lien thereon, subject only to the lien of current taxes, and, if such acquisitions consist of gas leases, as contemplated in Subparagraph B of this Section, subject also to the lien of any farm mortgages then affecting the interest of the lessor of such lease. Farm mortgages are hereby defined as incumbrances in an amount not exceeding sixty-five (65%) per cent of the value of such real estate for agricultural purposes and exclusive of any value of oil and/or gas or other mineral resources. If such opinion states that such acquisitions are acquired subject to such farm mortgages, the amount of such farm mortgages shall be set forth in such opinion, and such opinion shall be accompanied by the certificate of an engineer or appraiser selected by the Corporation and approved by the Trustee, appraising such agricultural value of such real estate.

e. A receipt or other evidence satisfactory to the Trustee establishing the payment of any recording or other tax required by law to be paid in connection with the issuance of such additional bonds or for the effectiveness of the lien of this indenture for the security thereof, upon any of the mortgaged property, together with an opinion of counsel satisfactory to the Trustee to the effect that the taxes paid constitute all taxes of either nature aforesaid, or in

the alternative an opinion of such counsel to the effect that payment of no such tax is requisite in this connection or for the purposes aforesaid

The Trustee may, at all times in its discretion, and shall upon the written request of the holders of ten (10%) per cent or more of the aggregate principal amount of the bonds issued and outstanding, and upon being offered indemnity sufficient to cover any cost or expense, investigate the truth of any statement contained in any paper or instrument furnished it in accordance with Subparagraphs a, b, c, d, and/or e of this Section, and for that purpose may employ engineers, appraisers, accountants, attorneys, and others selected by it in good faith and believed by it to be competent to investigate the truth of any such statements and on whose report it may absolutely rely. Any action taken by the Trustee pursuant to any such report shall be conclusive upon the Corporation with respect to any provision of this Section, and shall involve the Trustee in no liability whatsoever.

In an open end indenture, the conditions for the issue of the additional bonds are similar to those given above except that the aggregate amount of bonds which may be issued is not limited.

RELEASES.—Frequently it will be found advantageous for a corporation to sell or exchange part of its mortgaged property. Such a contingency cannot be foreseen at the time the indenture is executed, and to allow therefor a provision will be inserted, permitting the obligor to dispose of, and the trustee to release, such property, provided the sale price shall be deposited with the trustee or that the property received in exchange shall be placed under the indenture. A typical example of such provision is as follows:

(Form of Release Provision)

ARTICLE .....

RELEASES

Section 1. While the Company shall be in possession of the property hereby mortgaged and conveyed, and there shall be no existing

default in payment of the bonds or interest coupons secured hereby, or in the payment of taxes or other governmental charges or assessments or other payments herein provided, it is covenanted and agreed that the lien of this indenture upon specific parcels of real property (other than real property upon which is located or situated any factory or manufacturing plant of the Company or which real property or other property is appurtenant to any factory or plant of the Company) shall be released by suitable deed of release, by the Trustees when other real property of the same or greater value shall be substituted therefor and by proper instrument or instruments subjected to the lien of this indenture as a first lien thereon.

At the time that application for such release is made, a certificate of the Company, signed and verified by its President and one of its Directors, accompanied by the opinion of counsel satisfactory to the Trustees, or selected by the Trustees and paid by the Company, shall be filed with the Trustees, from which certificate it shall appear to the satisfaction of the Trustees that said real property to be received in exchange is of substantially the same value as the real property sought to be released, and that a substantially merchantable title thereto is vested in the Company, free of all liens other than the lien of this indenture and that said real property is subject to the lien of this indenture as a first lien.

Section 2. In addition to the right conferred upon the Company under Section 5 of this Article and while the Company shall be in possession of the property hereby mortgaged and conveyed, and there shall be no existing default in payment of the bonds or interest coupons secured hereby, or in the payment of taxes or other governmental charges or assessments or other payments herein provided, it is covenanted and agreed that the lien of this indenture upon any property of the Company may be released from the lien of this indenture by the Trustees by suitable deed or release, upon the payment to said Trustees of such an amount in cash as is the fair and reasonable value thereof based upon reports and valuations made by experts or appraisers selected and employed by the Trustees at the expense of the Company. Every application by the Company for such a release, shall be signed by the President or a Vice President and the Secretary or an Assistant Secretary of the Company and be accompanied by a certified copy of resolutions adopted by the Board of Directors of the Company, requesting such release. In addition thereto, before any release is executed and delivered by the Trustees, there shall be filed with the Trustees written consent thereto signed by a Vice President or the Manager of the Bond Department of the Institute Trust and Savings Bank of Chicago, Illinois. The Trustees shall not be required

to verify the report of any of said experts or appraisers as to the value of the property, and may accept the valuation fixed in any report made by such experts or appraisers as the valuation of the property to be released, and as the amount of money to be paid to said Trustees in consideration of such release.

Section 3. The proceeds received by the Trustees from the sale, release, or disposition of any property under the provisions of Sections 1 and 2 of this Article shall be paid over by the Trustees to the Trustee, and applied by the Trustee, toward the retirement of outstanding bonds, in the manner provided in said Article . . . hereof, provided, however, that so long as the Company is not in default hereunder, and with the consent of a Vice President or the Manager of the Bond Department of the Institute Trust and Savings Bank of Chicago, Illinois, such proceeds or so much thereof as may be requested by the Company by resolutions adopted by its Board of Directors may be paid over by the Trustee within three months after receipt thereof, to the Company for the purpose of making additions or improvements to the Trust Estate, such payments to be made by the Trustee from time to time as such work progresses upon the filing with the Trustee of certificates of engineers or agents selected or approved by the Trustee stating the amount and cost of such work, and the nature thereof, or for the purpose of compensating the Company for such additions or improvements already made, such payments then to be made upon similar certificates describing said additions or improvements, the cost or fair value thereof, whichever is lower, which shall be the maximum amount payable hereunder and stating that the same had not theretofore been made the basis of the withdrawal of proceeds under this Section, and in each case such requests, resolutions, and certificates to be accompanied by opinion of counsel satisfactory to the Trustee stating that such improvements or additions are subject to the first lien of this indenture.

Section 4. The Trustees are authorized to act upon, and shall be protected in acting upon, the certificates, orders, and other documents required to be filed with said Trustees or either of them under any of the provisions of this Article, and shall be under no obligation to make any independent investigation of the facts stated in said certificates, orders, or other documents; but the Trustees may in their sole discretion make such investigation as they may deem proper under the circumstances with respect to anything stated in said certificates, orders, or other documents, before acting thereon, and the expense of such investigation shall be paid by the Company upon demand, and in default of such payment shall constitute a lien upon the Trust Estate in addition to all other amounts due hereunder.

Section 5. So long as the Company is not in default hereunder in payment of the bonds or interest coupons secured hereby or in the payment of taxes or other governmental charges or assessments or other payments herein required to be made, it may sell, exchange, or otherwise dispose of such materials, machinery, tools, implements, equipment, and other movable property, as it has become inexpedient to use for the purpose of the Company's business, or which may have become old, worn out, used up, or undesirable; provided, however, that the Company shall not thereby in any manner impair the efficiency or value of the property which is subject to this indenture or impair the security thereof, and that the same shall be replaced by other property of equal value. Nothing herein contained, however, shall prevent the Company from selling or otherwise disposing of any of its raw materials or manufactured products in the ordinary course of its business so long as the Company is not in default hereunder.

Section 6. No purchaser in good faith shall be bound to ascertain the authority of the Trustees to execute any release provided for under this Article, or to inquire as to any facts required for the exercise of such authority.

PROVISION FOR MINIMIZING TAXATION.—In cases of bonds having a wide distribution, the underwriters desire to make them as free from taxes as possible; to this end, they insert a provision for the payment or refunding of certain state taxes in addition to the payment of the federal income tax. A typical example of such provision is as follows:

That upon written application, the Company will reimburse to the bearer, or, if registered, to the registered owner of any debenture issued hereunder, any tax imposed under the laws of the Commonwealth of Pennsylvania or the State of Connecticut upon such debenture or upon the said bearer or registered owner as a resident of said Commonwealth or said State respectively by reason of ownership of such debenture, but not exceeding four (4) mills per annum on each dollar of the principal amount of such debenture and also any income tax which may be imposed on the bearer or registered owner of any debenture issued hereunder by reason of his ownership thereof, under the laws of the Commonwealth of Massachusetts, but not in excess of six (6%) per cent per annum of the income derived from the interest

of such debenture; provided, however, that any such application shall be made to the Company in writing, supported by the applicant's oath or affirmation, within sixty (60) days from the date of payment of any such tax and within nine (9) months after such tax shall have become due and payable, and any such application for reimbursement shall set forth the fact of ownership of any such debenture or debentures, together with the number or numbers thereof, the residence of the applicant at the time said tax was assessed against him, and that such tax was assessed upon and paid by him because of the ownership by him of such debenture or because of the deriving by him of income therefrom, and such further facts with respect to the legal liability of such bearer or registered owner to pay such tax and of his right to request such reimbursement as the Company may reasonably require. The Company in no event shall be liable to reimburse such bearer or registered owner for or in respect of any interest or penalty assessed upon or paid by such bearer or registered owner, in addition to the amount of any such tax as originally assessed, or unless application be made in the manner and within the periods of time, respectively, above stated. If under the laws of any such Commonwealth or State now or hereafter in force, the Company be required or permitted to withhold or pay the amount of any such tax, and pursuant thereto shall withhold the same or pay the same directly to such Commonwealth or State the Company agrees, in lieu of reimbursing such tax as above provided, to pay the principal and interest of such debentures without deduction on account of any such tax so withheld or directly paid by the Company not in excess of the rates of tax above provided.

It is not probable that all of the above quoted clauses would appear in any one trust indenture in the nature of a mortgage, but it is possible that there would be a number of them. The requirements of the obligor and the opinions of the underwriters as to the conditions on which the loan should be made determine the clauses that the attorneys would insert in the indenture.

No special comment seems advisable with respect to the above quotations; first, because the sections more or less explain themselves; and second,

because to attempt an adequate explanation of the origin, significance, and legal effect of the various paragraphs would be impracticable, if not impossible, within the limits of this text.

SIMILARITY OF EQUIPMENT TRUSTS AND INDENTURES. — So-called "equipment trusts," or instruments securing obligations created with respect to equipment of railroads and the like, are, in the main, similar to corporate mortgages or indentures, and the above remarks apply equally thereto. With respect to equipment trusts, however, the so-called "Philadelphia plan" was evolved by John G. Johnson, Esq., of the Philadelphia Bar. Under that plan, the trustees became the owners of the equipment and, by a proper instrument, leased the equipment to the railroad company, which in its turn agreed to pay a certain rental therefor and to pay taxes, charges, and other items. Out of those rentals the interest on the obligations, issued to secure the repayment of the money obtained to buy the equipment, was paid to the bondholders and a sinking fund provided for the retirement of the bonds. Except as to the special provisions and practices incidental to the operation of the equipment trust on the Philadelphia plan, such trusts are administered, as has already been intimated, in very much the same way as are other corporate trusts, and the provisions of the indentures used are quite similar.

FEES.—The fees incident to services performed by trustees under corporate trusts fall under

several heads and are by no means uniform in all sections of the country. The fees usually collected are (1) acceptance fee, to cover services incident to establishment of the trust, preliminary negotiations, consultations, investigations, and examination of all papers and documents necessary to the proper administration of the trust; (2) certification fee, for certifying the bonds or notes issued; (3) annual fee, to cover ordinary services involved in administration of the trust, consultations, correspondence, accounting, and reports; (4) fee for care of sinking fund, sometimes included in annual fee, depending upon nature and amount of work and responsibility; (5) fee for paying bonds and coupons; (6) fiscal agency fee, for making returns of ownership certificates to treasury department; (7) partial release fee, for execution of partial releases under terms of trust instrument; (8) registration fee, for registration of bonds either wholly registered or registered as to principal only; and (9) closing fee, for services incident to execution of final release or reconveyance, checking bonds presented as evidence of full satisfaction of debt, and canceling or incinerating same.

OTHER REMUNERATION. — Another source of remuneration flows from the interest earned on funds deposited by the corporation obligor with the trustee, for payment of coupons as they fall due and also for payment of bonds as they mature. As a rule, the money deposited for the purposes mentioned remains with the trustee for a con-

siderable time. In some cases, trustees have required, as an element in determining the fees to be charged, that money for coupon and bond maturities be deposited from ten to thirty days in advance of the due dates and, further, that no interest be allowed thereon.

On the whole, corporate trust business, carefully chosen and conservatively handled, should be very remunerative.

The records kept throughout the country by the several banks and trust companies engaged in corporate trust business, are so varied in detail—although fundamentally similar in substance—that it seems unwise to attempt to reproduce any particular set of them here. The student's attention, however, is directed to the volume by Page and Gates, entitled, Work of Corporate Trust Departments, and published by Prentice-Hall, Inc., New York. He will there find a great variety of reproductions of the applicable forms used in administering corporate trusts.

CHAPTER XIII

Corporate Trusts (Continued)

ANOTHER activity of the corporate trust department of a bank or trust company is that of acting as transfer agent for some other corporation. As such agent for the other corporation (sometimes, also, for individuals; *e. g.*, voting trustees), the bank or trust company issues certificates representing shares of the stock of such corporation or a participation therein; also, as agent, it makes a record of the changes of ownership of such stock or participation right; in addition, of course, as such transfer agent, the bank or trust company keeps full and complete records of all such transactions.

Transfer Agencies and Registrarships

PREPARATION NECESSARY FOR AGENT.—Acting as transfer agent requires skill and experience, and careful consideration should be given to the subject before any such work is undertaken. As yet, no great body of law or legal principles has been developed, and comparatively few decisions will be found to direct one's actions, although they well serve as guides and warnings.

RECENT GROWTH REQUIRES STUDY OF SUBJECT.—As a result of the comparatively recent but tremendous growth of corporate activities, the questions of the issuance of certificates of

stock, of interests in corporations, of the transfers thereof, and of the dealings therewith, are becoming more and more important. Textbooks—such as the recent one entitled, Work of Corporate Trust Departments, by Page and Gates (1926)—and also pamphlets, articles, and so forth, in legal, banking, and other periodicals, should be consulted and constantly referred to by those who undertake any work of the kind under discussion. The student, particularly, is urged to familiarize himself therewith.

The following brief statement by the United States Supreme Court will be found helpful:

> Private corporations are but associations of individuals united for some common purpose, and permitted by law to use a common seal and to change its (their) members without a dissolution of the association. (Baltimore & Potomac Railroad v. Fifth Baptist Church, 108 U. S. 317, 330 [1883]; quoted in the case of U. S. v. Trinidad Coal Co., 137 U. S. 160 [p. 169], 34 L. Ed. 640 [1890].) In the latter case the court said, by Harlan, J., "An incorporated company is an association of individuals acting as a single person, and by their corporate name."

ACQUIRING AN INTEREST IN A CORPORATION.—An interest in a particular corporation is created by a contribution to the capital thereof, either at the time of the incorporation, or thereafter at the time of the increase of capital of such corporation; or it is acquired by the purchase of the stock already issued. The ownership of such an interest is evidenced by certificates, called "certificates of stock" or "stock certificates." These certificates confer no right or title to the corporate property itself. The holders of these certificates are

entitled merely to a *pro rata* (proportionate) share of the assets of the corporation on dissolution remaining after payment of debts, taxes, and other charges, unless given a preference by the terms of the certificate, as is frequently done in the case of the issuance of preferred stock.

THE STOCK CERTIFICATE.—A stock certificate is merely an evidence of ownership. It is comparable in that respect to a deed to land or a bill of sale of personal property, although, in the case of a stock certificate, the owner is not able to take physical possession of any specific property. It is one of the most usual examples of "intangible" property and must ever be so considered.

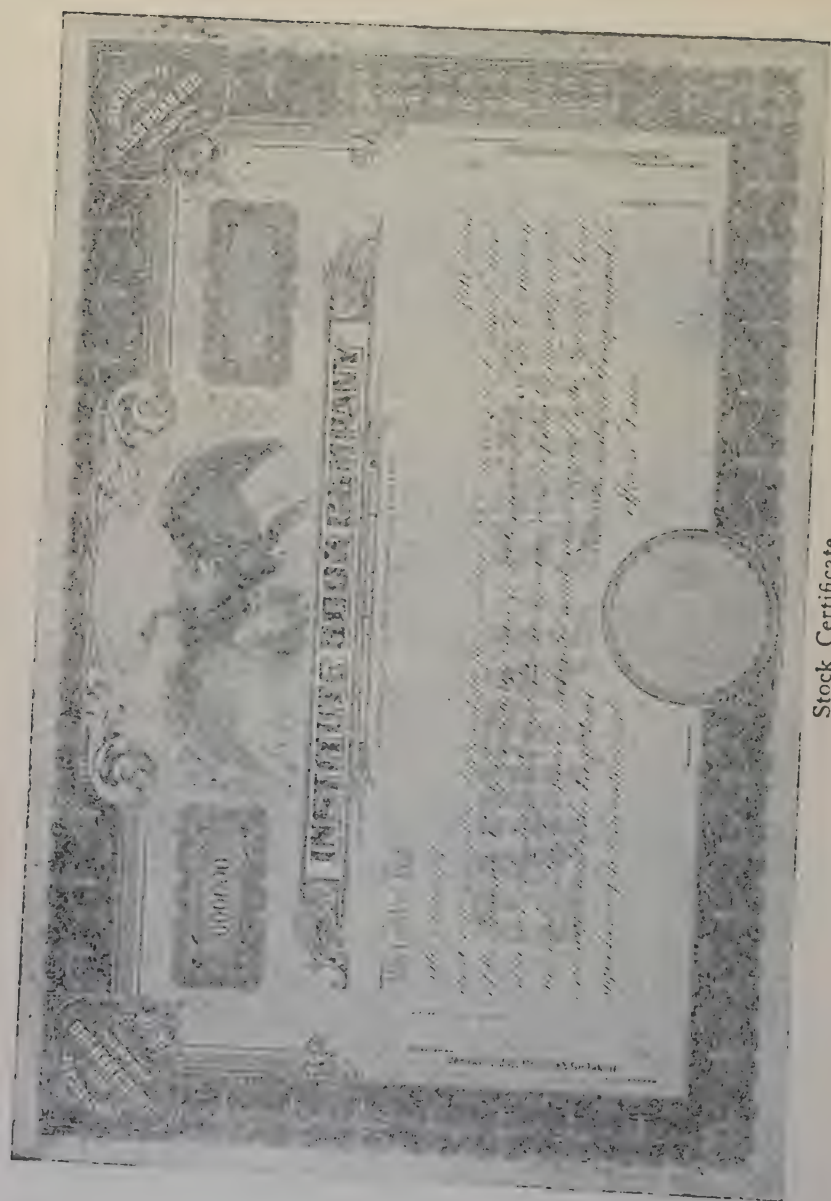
An example of the form of the typical stock certificate is given on the following page.

On the reverse side of each stock certificate is a form of transfer or assignment usually spoken of as the "power," a copy of which is reproduced in this chapter.

The signature on the assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

In some instances loose "powers" are used; that is, forms of transfer or assignment written or printed on a piece of paper other than the certificates of stock to which they relate.

In case such loose power is used, it should refer specifically to the exact certificate intended to be transferred under it, by giving the number of such



Stock Certificate

certificate or by other positive means of identification.

If the common stock is issued subject to limitations or conditions of any kind, they are usually

For Value received, ___ hereby sell, assign, and transfer unto

_____

_____

_____

_____ Shares

of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint _____

_____ Attorney

to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated, _____ 19___

_____

In Presence of _____

NOTICE: THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE, IN EVERY PARTICULAR, WITHOUT ALTERATION OR ENLARGEMENT, OR ANY CHANGE WHATEVER.

printed on the back of the stock certificates and referred to on the face thereof.

Some corporations also issue preferred stock, having special privileges or preferences as to dividends, as to distribution of assets upon dissolution,

or as to both; all such privileges appear and are referred to in the certificates which are issued therefor.

STOCK CERTIFICATES ARE TRANSFERABLE AND QUASI-NEGOTIABLE.—Certificates having been issued in due course and in proper form, the next question which naturally arises relates to the manner in which owners and holders may deal with them. Certificates are not generally held to be negotiable, although in the states which have adopted the Uniform Stock Transfer Act they have some of the attributes of negotiability; and in some cases they have been termed by courts and text writers to be "quasi-negotiable." As has already been intimated, a stock certificate is transferable by assignment, either by indorsement on the certificate itself or by a separate written instrument, which must be attached to the certificate to which it relates. It is necessary and important for the holders of certificates of stock, in order that they may be duly recognized as stockholders to the extent of their holdings and may, in due course, receive dividends and notices relating to the corporation in question, to see to it that the transfer thereof to them is properly made on the books of the corporation. When the law requires transfers of stock to be filed with the county clerk or the recorder, the stockholder should insist that the transfers be correctly entered upon the proper records. In fact, supervision of such entries is and should be one of the duties of the transfer agent.

BANKS AND TRUST COMPANIES AS TRANSFER AGENTS.—To facilitate transfers of stock, many corporations employ trust organizations to act as their transfer agents; this activity of such institutions will now be discussed in some detail. To safeguard the issue further or to protect themselves against an overissue, such corporations also employ a registrar which acts as a check on the transfer agent. This phase will be discussed later.

CONTRACT MAY BE TERMINATED WITHOUT STOCKHOLDERS' CONSENT.—The relationship of the transfer agent is established by contract, usually in the form of a resolution of the board of directors of the corporation for which the transfer agent is to act. Such resolution appoints the transfer agent; it also sets out not only the amount and classes of stock authorized by the charter—or any amendment thereof—and the amount and classes of stock to be presently issued, but also the conditions under which the transfer agent may issue, and the terms of transfer. As the relationship is contractual, it may be terminated by either party at any time without the consent of the stockholders. A transfer agent may be termed a corporate agent of the corporation for which it acts; as such, it is subject to the direction of the corporation. Whenever stock of no par value is to be issued, the proposed transfer agent, as a matter of good business policy, should make some investigation as to the physical property of the corporation before becoming a party to the transaction in any way.

PRECEDENTS OF OPINION RATHER THAN LAW.—While the responsibilities of fiduciaries generally have been quite well defined by statute or by court decisions, there is very little law of either kind as to the duties and liabilities of transfer agents and registrars; the prevailing practices are largely the result of opinion and experience.

DOCUMENTS TO BE FURNISHED.—The first step in the acceptance of a transfer agency by the bank or trust company intending or appointed so to act is to require the following as a matter of good business policy though not of legal obligation:

1. Copy of articles of incorporation and all amendments to date, certified under seal by the secretary of state or other proper officer of the state of incorporation

2. Opinion of counsel that the corporation has been legally incorporated and, if doing its principal business in a state other than that of incorporation, that it has complied with the foreign corporation act of such state, the opinion should also state whether or not the sale of the stock to be issued requires the corporation to qualify under any "blue sky" laws and, if so, that it has complied with such laws. (In cases of corporations subject to regulatory commissions, such as public utilities, whose security issues are subject to the approval of such commissions, the opinion of counsel should further recite that the approval of the commission has been obtained.)

3. Copy of the by-laws of the corporation, with all amendments to date, certified under seal by the secretary or other proper officer of the corporation

4. Copy of the resolution duly appointing the transfer agent and setting forth the character and amount of stock outstanding, to be issued, and subject to transfer, all duly certified

NOTE: Specimen form of resolution appears in this chapter.

5. Copy of the resolution adopting the form of stock certificate, together with a specimen certificate, both duly certified

NOTE: A specimen form of stock certificate should be submitted for approval before it is engraved.

6. Certificate, by proper officer, showing autographic specimen signatures of the officers duly authorized to sign the stock certificates in behalf of the issuing corporation

7. Signature cards showing signatures of officers duly authorized to sign on behalf of the registrar, if any, acting for said corporation, all duly certified

8. Copy of resolution or specific by-law, setting forth the conditions upon which new certificates may be issued in lieu and place of stock certificates, lost or destroyed, and fixing the amount of the indemnity bond which shall be required, all duly certified

If such action is required by law, a certified

copy of the resolutions adopted by the stockholders of the corporation, approving the issue of stock and the appointment of the transfer agent is secured.

NOTE: The above should all be filed, alphabetically or otherwise, so as to be readily available when needed.

After all the above documents are in hand, having been submitted to and approved by its counsel, the transfer agent is then ready to proceed with its duties.

The following is a form in general use for appointment of transfer agent and registrar:

(Form of Appointment of Transfer Agent and Registrar)

Certified Copy of Resolutions
of the
Board of Directors
of
LAKE CITY MERCANTILE CORPORATION

WHEREAS, This Company, Lake City Mercantile Corporation organized and existing under and by virtue of the laws of the State of Delaware, has an authorized capitalization of

1,000 shares of Preferred stock, of $100 par value a share
2,000 shares of Common stock, of No par value a share

and

WHEREAS, This Company desires to appoint a Transfer Agent and a Registrar in the City of Chicago, Illinois, for its certificates of stock, and to define their duties:

NOW, THEREFORE, BE IT AND IT IS HEREBY RESOLVED AS FOLLOWS:

First: That Institute Trust Company, located at Chicago Illinois, be and it is hereby appointed the agent of this Company, with the title of "Transfer Agent," to issue certificates for shares of the capital stock of this Company, and to transfer the same from time to time.

Second: That for the purpose of the original present issue of certificates, the said Transfer Agent shall be and hereby is authorized to issue, execute, record and authenticate certificates of said stock when

signed by the President or Vice President and the Treasurer or Secretary, or Assistant Treasurer or Assistant Secretary of this Company, under its corporate seal, to an amount not exceeding:

One thousand Shares of such Preferred stock
Two thousand Shares of such Common stock

Said certificates to be registered in such names and to be issued for such number of shares as shall be specified to it in writing by the Vice President and Secretary of this Company; thereupon said certificates shall be delivered to the Registrar hereinafter referred to, for registration and delivery on the order of the officers as above indicated.

Third: That said Transfer Agent be and it is hereby authorized and directed to make exchanges and transfers from time to time on the books of the Company, of such certificates of stock as may be surrendered for exchange or transfer and properly assigned, and to issue in lieu thereof new certificates of the same class or character and for the same number of shares, and to record and authenticate such new certificates and deliver them, together with those surrendered for exchange or transfer, to the Registrar hereinafter named, for registration.

Fourth: That Chapter Trust and Savings Bank located at Chicago, Illinois, be and it is hereby appointed the agent of this Company, with the title of "Registrar," to register certificates for shares of capital stock of this Company, as and when the same are issued by this Company and authenticated by the Transfer Agent, to an amount not exceeding the number of shares and classes indicated in Paragraph Second of these Resolutions, and deliver the certificates when so registered to said Transfer Agent, or in accordance with the orders of the officers of the Company as set forth in Paragraph Two.

Fifth: That said Registrar shall be and hereby is duly authorized and directed to register upon the registration records and to authenticate from time to time transfers of certificates of stock of the classes above indicated, when the certificates issued in connection with such transfers are properly signed and sealed in behalf of this Company and authenticated by said Transfer Agent, and when such new certificates are accompanied by canceled certificates theretofore registered by it for the same number of shares and same classes represented by the new certificates issued.

PROVIDED, HOWEVER, That the Registrar shall be under no duty whatsoever in connection with the names in which certificates are issued, or the correctness or sufficiency of any transfer from one name to another.

Sixth: That the authority contained in these resolutions for the issuing, signing, authenticating, and registering of certificates of stock

of this Company, shall apply to certificates of stock in temporary form as well as certificates of stock in permanent form, and that certificates in temporary form shall be exchangeable for certificates in permanent form through the office of the Transfer Agent when permanent certificates shall have been prepared.

Seventh: That specimens of the stock certificates in the form adopted by the Company, and specimen signatures of the officers of the Company authorized to sign such certificates in its behalf, shall be furnished to said Transfer Agent and Registrar for the purpose of comparison with signatures appearing on certificates of stock of the Company presented to them or either of them in their respective capacities, as authorized by these resolutions, and that said Transfer Agent and Registrar, and each of them, shall be protected and held harmless by the Company in recognizing and acting upon, after comparison with such specimen stock certificates, and such signatures, any such certificates of stock and signatures believed in good faith to be genuine, and that when any officer of the Company shall no longer be vested with authority to sign for the Company written notice thereof shall be given immediately to the Transfer Agent and Registrar, and until receipt of such notice the Transfer Agent and Registrar shall be fully protected and held harmless in acting upon certificates bearing the signatures of such officer or a signature purporting to be the signature of such officer, and believed by them, or either of them, in good faith, to be genuine.

Eighth: That from time to time additional officers may be appointed by resolution of the Board of Directors of the Company and to sign certificates of stock in behalf of the Company, and in every such case specimen signatures of such additional officers and certified copies of the resolutions of the Company effecting such appointment of its officers shall forthwith be lodged with the Transfer Agent and Registrar.

Ninth: That in case of doubt or dispute respecting the performance of any of the duties authorized or required to be performed by these resolutions or in connection with any question arising with reference to the sufficiency, form, or propriety of any transfers requested or registrations to be made, the Transfer Agent and Registrar may apply, at the expense of this Company, to their counsel respectively, or to Rufus Sherman as counsel of this Company for instructions, advice, and opinion, and shall be fully protected and held harmless from and against any and all liability in acting upon instructions, advice, and opinions given in accordance with such application.

Tenth: That the authority of the said Transfer Agent and Regis-

trar respectively, shall also extend to the authentication as such Transfer Agent and Registrar, of any certificate or certificates of stock which may be issued by the authority of this Company evidenced by a certified copy of a resolution of the Board of Directors of this Company, in lieu of a lost or destroyed certificate or certificates of stock. A satisfactory indemnity bond shall be required in such amount as the Directors may designate or as may be provided by the By-laws of this Company, and in any event not less than the value of such certificate, wherein this Company, the Transfer Agent and Registrar shall be named as the obligees. The bond shall be in a form and amount and with surety or sureties satisfactory to this Company, the Transfer Agent and the Registrar.

Eleventh: That the President or Vice President and the Secretary or an Assistant Secretary of this Company be and they hereby are directed to certify a copy of these resolutions and of the By-laws under the seal of this Company, and to lodge them, together with certified specimen certificates of the stock of this Company in the forms duly adopted by it, copies of the Charter or Certificate of Incorporation or Reorganization and all amendments thereto properly certified by the Secretary of State, with the Transfer Agent and the Registrar, and to furnish the Transfer Agent and the Registrar, certified copies of any amendments that may from time to time be made to the Charter or Certificate of Incorporation or By-laws.

We, the undersigned, Allison D. Fosdick, Vice President, and Louis S. Earling, Secretary of Lake City Mercantile Corporation do and hereby certify that said Company is a corporation duly organized and existing under the laws of the State of Delaware; that at a meeting of the Board of Directors of said Company duly held and convened according to the By-laws of said Company on the 25th day of May, 1927, a quorum being present and voting thereon, the foregoing resolution was unanimously adopted, and that the foregoing is a full, true, and correct copy of said resolution as it appears on the records of said Company.

We further certify that the signatures of the officers referred to in said resolution and authorized thereby to sign certificates of stock for and in behalf of said Company are as follows:

President James V. Willis	will sign	Jas. V. Willis*
Vice President Allison D. Fosdick	will sign	A. D. Fosdick
Secretary Louis S. Earling	will sign	L. S. Earling
Assistant Secretary John Z. Nott	will sign	J. Z. Nott

*Signatures in this column should be actually written by the officers.

and that said officers have been duly elected and qualified and are now serving in their respective official capacities.

We further certify that the matters and things set out in these resolutions and authorized thereby are not contrary to the terms of the Charter or By-laws of this Corporation, or any amendments thereto.

Hereto attached are the following documents initialed by the undersigned, to wit:

1. Copy of Charter or Certificate of Incorporation or Reorganization of the Company and all amendments thereto, certified to by the Secretary of State, marked "Exhibit A."
2. Copy of the By-laws and regulations of the Company, together with all amendments thereto, marked "Exhibit B."
3. Specimen certificates of stock of the Company in the forms duly adopted by it, marked "Exhibit C."

and we hereby certify that Exhibits A and B are true and correct copies of the originals of those documents respectively, and that the specimen certificates of stock designated Exhibit C are the forms of stock certificates adopted by the Company.

The office and place of business of said Company is located at 302 East Monroe Street, Chicago, Illinois.

IN WITNESS WHEREOF, We have hereunto signed our names in our official capacities and affixed the seal of the Company this 31st day of May, 1927.

A. D. FOSDICK
Vice President
L. S. EARLING
Secretary

(Corporate Seal)

LAWS OF AGENCY AND STOCK TRANSFER APPLY TO AGENT.—The transfer agent, being but the agent of the corporation whose stock it transfers, as above noted, is subject to the usual laws of agency, and all laws governing the transfer of its stock by the corporation itself apply with equal force to its transfer agent.

AGENT'S DUTIES IN REGARD TO ORIGINAL AND INCREASED SHARES.—In the case of a new corporation, the transfer agent is naturally concerned with the original issue and delivery of cer-

tificates, representing the number of shares duly authorized to be issued by the charter, or the number of shares the corporation, by proper resolution, may direct the transfer agent to issue. The transfer agent should see that the certificates representing the issue are signed by the proper officers and that delivery is made in accordance with the resolutions authorizing such issue. If the corporation increases the amount of its capital stock, the issuance of additional certificates should be authorized by appropriate amendments to its charter and such other appropriate action, with respect thereto, as may be required by law; and due evidence thereof should be lodged with the transfer agent and submitted to counsel for approval, prior to the taking of any action by the transfer agent to effect the issuance of such additional stock.

THE TRANSFER OF CERTIFICATES.—When a certificate is to be transferred, it is presented to the transfer agent for that purpose. The agent examines the certificate to see that it is properly indorsed or assigned, that is, that the signature to the assignment agrees with the name of the stockholder as written on the face of the certificate. (See form of assignment.) The signature on the assignment should be witnessed, and the assignment should bear a date later than that of the certificate itself. If the signature is not known to the transfer agent, he should require that it be properly guaranteed. The practice in some states is to require that all signatures on assignments should be guaranteed

by a known member of a stock exchange or by a known banking institution. This guarantee is usually placed immediately below the signature somewhat as has already been shown in this chapter. (In some cases, signatures are attested by a notary public with a recital in attestation that the person signing the assignment [or power as it is very often designated] is known to the notary to be the person whose name appears on the face of the certificate. Such attestation should be further safeguarded by a certificate of the clerk of the proper court certifying to the genuineness of the notary's signature. Such method of authentication of the signature of the assignee is not looked on with favor in some parts of the country. It has been held that a person witnessing a signature to an assignment is in effect a guarantor of the genuineness and validity of the signature witnessed. [Second National Bank v. Curtis, 153 N. Y. 681; Bank of England v. Cutler, 98 L. T. 336.])

PRELIMINARIES OF TRANSFER. — The transfer agent, in accepting a certificate, must be assured that the stockholder has done everything requisite to part with his title, and for that reason these requirements should be strictly adhered to.

The transfer agent should also see that the proper amount of documentary, transfer, or other stamps, both state and federal, are affixed, wherever necessary. In this connection, it seems almost superfluous to say that those acting as transfer agents must keep themselves fully informed of pro-

visions of local, state, and federal laws and regulations relating to taxation of transfers and other requirements incident thereto.

If the new certificate is to be issued to a corporation, or to any one acting in a fiduciary capacity, the better practice is for the transfer agent to require production of the appropriate documents showing the authority of the proposed assignee to receive such certificate.

The name and the address of the person or party to whom the new certificate is to be issued should be shown in the indorsement or assignment or by a letter of instructions, always in proper form.

As heretofore indicated, the assignment may be on a separate sheet of paper.

ISSUANCE OF NEW CERTIFICATE.—All the above details having been found satisfactory, the transfer agent then issues a new certificate, cancels the old one, and enters in the stockholders' ledger, kept by such transfer agent, the name and address of the new stockholder, the new certificate number, and the number of shares. This stockholders' ledger varies considerably in form, but a fair specimen is shown on the opposite page.

A general stock ledger is also kept, showing the original issue and also the additional issues from time to time authorized.

OTHER DETAILS.—If there is no registrar—or if, when there is a registrar, the cancelation has been properly registered by him and the old certifi-

cate returned—the transfer agent retains and properly files the old and canceled certificates.

In canceling the old certificate and issuing a new one, the corporation—or a transfer agent, acting for it and in its behalf—in effect guarantees to the person or party to whom the certificate is issued that he or it has a good title thereto. (See Crocker v. Railroad, 137 Mass. 417.)

It is the practice for transfer agents to hold

(Form of Stockholders' Ledger)

SHEET NO..... INSTITUTE CORPORATION

NAME.....

ADDRESS.....

DATE ISSUED OR SURRENDERED			TRANSFERRED FROM OR TO	CERTIFICATE NUMBERS		RECORD OF SHARES		
Month	Day	Year	NAME	Issued	Surrendered	Shares Issued	Shares Surrendered	Balance

or keep on hand blank certificates of stock signed by the proper officers of the corporation; this precaution accelerates transfers.

One of the details of importance, in connection with the issue of certificates, is the manner of showing the name of the owner of the certificate on the face thereof. When the certificate is presented for transfer, if the name has been properly written on the certificate, the transfer agent will have a guide as to what is necessary to effect a transfer.

Carelessness or errors in this regard mean delay and confusion in making transfers; care used at the time of issue avoids explanations at the time of transfer. These observations apply with equal force to the manner of writing names both on original issues and on subsequent transfers.

USUAL FORMS OF ISSUE AND TRANSFER.—The matter of the issue and transfer of stock certificates falls naturally into the classification here shown. Certificates usually are issued or are transferred by or to the following:

1. One individual
2. Two or more individuals
3. Two or more individuals jointly
4. Partnerships
5. Corporations
6. Fiduciaries

Each class will be given separate consideration. First, to an individual:

a. The full Christian name, or a recognized abbreviation, should appear on the certificate; the initials are insufficient.

b. Titles such as Reverend, Doctor, Colonel, and so forth should not be used, nor indicia of academic degrees, as M.D., D.D., and so forth.

c. Certificates issued to women should show marital status by Miss or Mrs. in parentheses. The Christian or given name of a woman and

not that of her husband should be used; thus: (Mrs.) Sally B. Bostwick, not Mrs. George W. Bostwick; or (Miss) Susan W. Reed, not Susan W. Reed.

Second, to two or more individuals:

a. The full Christian names should appear on the certificates, as in (a) issues to individuals.

b. Certain titles are not to be used; see (b) issues to individuals.

c. Certificates issued to women should be issued as in (c) issues to individuals.

d. When certificates are issued to two or more persons, the conjunctive and not the disjunctive should be used; that is, say John S. Williams *and* Samuel Williams, not John S. Williams *or* Samuel Williams.

e. When certificates are issued as in (d), the certificate holders are said to hold as tenants in common. Each has an individual interest in the stock, which, when he dies, becomes a part of his estate. In states where tenancy by the entirety in personal property is recognized, if certificates are issued to husband and wife, without more, *e.g.*, to "John Smith and Mary Smith, his wife," a tenancy by the entirety is created, and the survivor takes the stock on the death of either. (See [c] of Third, issues to two or more individuals jointly.)

Third, issues to two or more individuals jointly:

a. This class relates to those cases in which it is desired so to issue the stock that the survivor or survivors will take the whole property after the death of one of the certificate holders.

b. Follow (a), (b), and (c) above, regarding issues to two or more individuals.

c. If the certificate be issued to a man and his wife, they hold, in those states where such tenancy is recognized and permitted by law, as tenants by the entirety, and the certificates should read: "John Jones and Mary Jones, his wife, as tenants by the entirety"; or, as is the practice in some states: "John Jones and Mary Jones, his wife." On the death of either, the interest of the decedent in the stock goes to the survivor as his or her absolute property without the formality of a transfer.

d. If the certificate be issued to two or more persons to be held as joint tenants, with right of survivorship, the certificate should read: "Samuel Brown and Lemuel Watts, as joint tenants with right of survivorship and not as tenants in common." On the death of either of said joint tenants, his interest in the stock goes to the survivor as his absolute property without the formality of a transfer.

e. In some states, "tenancies by the entirety" and "joint tenancies" are not recognized with respect to personal property, either because

they never existed or because they have been abolished. In such states, where certificates of stock are issued to two or more individuals, they will be construed to hold such stock as "tenants in common."

Fourth, issues to partnerships:

a. Whenever it is desired to issue a certificate of stock to a partnership, the certificate should strictly read: "Charles Brock and James Ash, co-partners trading as Brock & Ash," but, in practice, certificates are often issued to "Brock & Ash" or other partnership name.

b. As to the names of the partners, follow (a), (b), and (c) in First above, regarding issues to two or more individuals.

Fifth, issues to corporations:

a. The full legal title of the corporation should appear on the certificate, *viz:* "The Institute Trust Company of California," or "Chapman and Black, Inc."; no abbreviations should be used unless they occur in the corporate title.

Sixth, issues to fiduciaries—administrators, executors, trustees, and guardians:

a. Certificates should be issued only to the fiduciary by name and title, as for instance:

   1. "John M. Curtis, administrator of the Estate of William Robinson, deceased," not merely to "John M. Curtis, administrator"; or

   2. "Institute Trust Company, trustee for Ed-

ward Weems under agreement dated January 3, 1923"; not to "Institute Trust Company, trustee."

NOTE: In cases of issues to trustees under deeds or trust agreements, certified copies of such deeds or agreements should be exhibited.

b. Certificates should never be issued to the "Estate of James Doak" without some other distinguishing title; first, because there is no such legal entity; second, because such certificate does not show whether it is held by the estate of a decedent, a minor, an incompetent, or for a trust. As in each case the transfer would be governed by different rules and with no notice of the capacity in which the fiduciary is acting, it would be difficult for the transfer agent to tell whether or not proper documents were presented to support the transfer when requested. Furthermore, such designation does not show the name of the fiduciary, and the transfer office does not know that the party who makes the indorsement on the certificate, for purpose of transfer, is the person who was acting at the time the certificate was issued and is the qualified fiduciary.

NOTE: The requirements of the federal and state laws governing the use of stamps on issues of stock should be carefully observed.

After the certificate has been properly issued and after proper record thereof has been made, it is then delivered to the persons named therein.

GENERAL REQUIREMENTS AS TO TRANSFERS.—Our next consideration is that of transfers of certificates of stock by the holders thereof or their duly qualified representatives. The same order will be followed as in the consideration of issues of certificates. First, however, the following general requirements should be observed:

1. The indorsement or assignment, either on the back of the certificate or on a separate piece of paper, usually called the "power" (see form shown elsewhere in this chapter), must be properly signed and the signatures duly witnessed and satisfactorily guaranteed.

2. The signatures on the power must be exactly the same as they appear on the face of the certificate, without abbreviation, enlargement, or other change.

3. The names and addresses of the transferees must appear on the indorsement or assignment and the denominations in which the new certificates are to be issued must be clearly stated.

4. A certified copy of the trust instrument must be exhibited if the transferor is a fiduciary of any kind, unless such instrument was furnished when the certificate was issued.

5. Evidence, by production of a certificate of comparatively recent date, must be furnished of appointment if the transferee is a guardian, committee, conservator, or similar fiduciary.

6. If the transfer is made to two or more persons, the nature of their holding, as (a) tenants in common, as (b) joint tenants, or as (c) tenants by the entirety, must be correctly shown and stated.

7. The space in the indorsement or assignment for the insertion of the name of the attorney who is to make actual transfer on the books of the corporation must be left blank, or, if filled in, the attorney, so named, should execute a substitute power to be stamped on the certificate and to be in substantially the following form:

> I hereby irrevocably constitute and appoint .... my substitute to transfer the within stock under the foregoing power of attorney, with like power of substitution.

NOTE: The above practice is followed because the person actually effecting the transfer on the books of the corporation is, almost universally, an employee of the corporation whose stock is being transferred, or of its transfer agent.

The form of the actual transfer or assignment as the same appears on the books is usually as follows:

> For value received, I, John Smith, assign and transfer unto Robert Brown, Ten (10) shares of Stock of Institute Trust Company.
> Witness my hand and seal this Second day of January, 1927.
>
> JOHN SMITH
> by Samuel Jones
> Attorney-in-fact

but, on account of the great number of transactions in the average transfer office, the more modern practice is for the transfer agent to use only one line for each transfer, for example:

> We, the owners of the Common Stock of Institute Trust Company, represented by the certificates herein described, for value received, do hereby assign and transfer the number of shares of said stock set opposite our respective names, to the persons as indicated:
> In witness whereof, we have hereunto set our hands and seals, the day and date set opposite:

STOCK CERTIFICATES SURRENDERED (left half of page)

Transfer Number	Date	Name of Stockholder	Signature of Attorney	Number of Certificates	Number of Shares	Posted

NEW STOCK CERTIFICATES ISSUED (right half of page)

To Whom Transferred	Address	Number of Certificates	Number of Shares	Posted

8. The proper transfer stamps in the proper amounts should not only be duly affixed, either to the certificates or to the memoranda of sale thereto attached, but also duly canceled. In all cases there should be federal revenue stamps attached and also, in some states, notably New York, Massachusetts, and Pennsylvania, state transfer stamps. Certificates sold or transferred in such states will need to have the state stamps affixed in addition to the federal stamps, but a transfer agent outside of those states need not concern itself with such taxes. The transfer agent, naturally, should keep itself informed on the subject of the stamps required and the law and regulations which govern the use thereof.

Transfers of Stock in Special Cases

SPECIFIC REQUIREMENTS.—Keeping in mind the above general requirements, consideration will now be given to specific cases.

First. Transfers of stock registered in the name of an individual. The procedure is quite simple. All that is needed is for the transfer agent to see that the general requirements above set forth are observed.

Second. Transfers of stock registered in the names of two or more individuals—holding as tenants in common. The procedure is as outlined above with respect to transfers by an individual, unless one or both of the individuals have died; in such case, as to the one deceased, the rules laid down for transfers by executors or administrators should be observed.

Third. Transfers of stock registered in the names of husband and wife, as tenants by the entirety. If both the husband and wife are living, they must both join in the transfer, and the rules laid down for transfer by individuals should be observed. If either husband or wife dies while holding said stock, the survivor by that fact alone takes the whole interest in the stock without any action being taken. If, however, the survivor desires to transfer said stock, all the rules relative to transfers by individuals should be observed, and, in addition thereto, the transfer agent should require and receive due written proof of the death of the tenant who has died.

Fourth. Transfers of stock registered in the names of two or more individuals as joint tenants.

The procedure outlined under Paragraph Third hereof applies with equal force to these transfers and should be carefully followed.

Fifth. Transfers of stock registered in the name of a partnership. The better practice is to require the several members of the partnership to execute the assignment somewhat as follows:

James Smith
Walter Brown
co-partners trading as
Smith & Brown
By
James Smith

although it is the practice in some states to permit the assignment to be made in the name of the partnership by one of the partners, *viz:*

Smith & Brown
By
James Smith

If the partnership has changed after the certificate was originally issued to certain persons trading under a certain name, there should be a transfer from the old set of partners or partnership to the new set of partners or partnership. If, in such a case, one of the partners has died, the surviving partner, as a general proposition of law, has the authority to make a transfer. Subject to the above, the procedure with respect to transfers by individuals should be carefully observed.

Sixth. Transfers of stock registered in the name of a corporation.

a. The assignment or indorsement should be executed by the duly authorized officers of such corporation.

b. A duly certified copy of the by-laws, showing the officers who are authorized to indorse or assign certificates of stock and showing the authority of such officers to make such sales, should be required by the transfer agent. If there is no general by-law covering the subject, then a duly certified copy of the resolution, authorizing the sale and naming the officers authorized to make the assignment or indorsement, should be furnished to the transfer agent.

c. A certificate (usually by the secretary), setting forth that the persons who executed the assignment or indorsement are the officers duly authorized to do so and that they were all duly elected and qualified so to act, should be furnished to the transfer agent.

NOTE: Whenever possible, the above-mentioned certificates should be executed by an officer other than one of those who executed the assignment or indorsement.

GENERAL PRINCIPLES AS TO TRANSFERS BY FIDUCIARIES.—Consideration will next be given to transfers by those acting in a representative or fiduciary capacity. As to these trans-

fers, it may be stated that only more or less general principles can be given here. Peculiar local statutes applicable to transfers of stock by fiduciaries may apply. As to such cases, the Stock Transfer Guide, issued by the Corporation Trust Company, New York, for the New York Stock Transfer Association will be found to be of general assistance. Transfers from decedents named to executors and administrators—and from them to beneficiaries and others—and transfers from and to guardians, conservators, trustees, and other fiduciaries—all, in a measure, are governed by the law of the state where such fiduciary was appointed and is acting. In general, it may be observed that, in order that the interests of the beneficiaries may be protected, corporations and their agents have been held to a high degree of duty in making transfers at the request of fiduciaries. Reference should be had to H. Bruce Campbell's work, Legal Aspects of the Transfer of Securities, and to that of Maraspin and Driver, Fundamental Principles of Stock Transfers, both of which are mentioned in that of Page and Gates, Work of Corporate Trust Departments already cited herein.

Keeping in mind the above general observations and the general requirements already outlined, the following additional rules, based on the Stock Transfer Guide above mentioned, may be laid down:

1. Transfers which are made by an attorney-in-fact

a. The original letter of attorney or a duly cer-

tified copy thereof, if it has been recorded, should be filed with the transfer agent, which should satisfy itself that the signatures thereon are genuine. The only safe practice is to require the production of the original letter of attorney which should be retained by the transfer agent.

b. Such letter of attorney should be submitted to counsel for his opinion as to whether it is sufficiently broad or explicit to authorize the attorney to make the transfer.

c. If the person executing the letter of attorney is a fiduciary, counsel should also pass on the question of whether such letter of attorney confers on the attorney such discretionary powers as said fiduciary is not legally authorized to delegate.

d. Care should be taken to see that such letter of attorney is still in effect at the time a transfer thereunder is attempted.

2. Transfers which are made by executor or administrator

a. A proper certificate showing the appointment of such executor or administrator and showing that he is presently acting—or has not been discharged—should be required by the transfer agent for its files.

b. A certified copy of the will, if there be one, should be exhibited to the transfer agent to show the authority for making the transfer and, if there are any conditions in the will

affecting such transfer, to show that such conditions have been complied with. It is preferable to retain such certified copy.

c. The transfer agent should be satisfied that the laws of the particular state authorize the executor or administrator to sell securities without an order of court, particularly when the securities about to be transferred have been specifically bequeathed to any one.

d. If the transfer is made to the executor or administrator, individually, or if it is clearly or apparently being made in distribution of the estate, a certified copy of order of court authorizing the same should be exhibited to the transfer agent and, if possible, retained for its files.

e. The transfer agent should require the production of a waiver or a release or a consent, from the proper tax authorities of the state wherein the corporation is incorporated, of the state wherein the transfer agent is located if in another state, and of the state of domicile of the decedent. In some instances, a release may also be required from the federal authorities under the Federal Estate Tax Law.

NOTE: As these requirements are very complex and are constantly changing, the student is requested to familiarize himself with the regulations as they may exist in his particular state.

f. The laws of some states require that before stock of corporations of that state, belonging to non-resident decedents, can be transferred, ancillary administration be taken out in the state of incorporation. When such is the case, the transfer agent must act accordingly.

3. Transfers which are made by a trustee.

a. A certified copy of the instrument creating the trust should be exhibited to and, when possible, should be lodged with the transfer agent.

b. The transfer agent should be satisfied that the instrument aforesaid confers proper authority on the trustee to make the transfer; otherwise, such transfer agent should require that a certified copy of an order of court authorizing such transfer be lodged with it.

4. Transfers by guardians, committees of incompetents, and conservators

a. There should be due proof of the appointment of such fiduciary; and there should be due proof that he (or it) has present authority to act and that proper security, when required, has been duly furnished and approved.

b. A certified copy of the order of court, authorizing the transfer, should be lodged with the transfer agent, unless the laws of the state, under which such fiduciary was appointed and is acting, authorize him (or it) to dispose of securities, at his (or its) discretion, without an order of court.

NOTE: While it is not necessary, as a general proposition of law, for all executors and administrators to act together, it is a safe rule to require that they do so in making transfers. Such united action should always be required in the cases of all other fiduciaries.

5. Transfers by receivers of corporations or trustees of bankrupts

a. The transfer agent should require evidence of the appointment of such receivers or trustees, and proof that they have present authority to act should be lodged with the transfer agent.

b. A certified copy of the order of court authorizing the transfer, if such order is required, should also be lodged with the transfer agent.

In addition to the above rules, there are several incidental matters constantly arising which require action on the part of a transfer agent. A brief outline of them follows.

Changes of Name

CHANGES IN FORM BUT NOT IN OWNERSHIP.—Occasionally a stockholder changes his or her name, and, although there is no change of ownership, he or she wants certificates issued in the new name. The general cases are the marriage of a woman or a change for convenience, as a shortening or anglicizing of a name. The certificates should be

signed thus: Alice S. Moore, formerly Alice S. Hicks, or Alice S. Hicks, now Alice S. Moore; or John Orden, formerly John Ordenstein, or John Ordenstein, now John Orden. Signatures should be guaranteed, but in most cases transfer stamps are not necessary.

Permanent Certificates for Temporaries

INDORSING, VERIFYING, CHECKING, AND OTHER DETAILS.—When temporary certificates are exchanged for permanent ones, most transfer agents require no indorsement of the temporary certificates if there is no change of ownership. Sometimes there is a change in the form of the certificate, and the outstanding certificates are called in to be exchanged for the new form; if the change is only in form and not in class of stock, no indorsement is necessary. When one class of stock is exchanged for another or when the holder of an outstanding certificate wishes the new certificate to be issued in a different name, the transfer power must be signed, the signature guaranteed, and the necessary stamps affixed.

After the new certificates are written, they should be checked to make sure that they are in the names of the persons to whom the old stock was to be transferred, that there is no error in spelling the names as shown on the assignment, and that they are in the denominations asked for. Whenever "limited share" certificates are used, the "fractional" share certificates should be checked to see that the

margin punching agrees with the number of shares shown by the body of the certificate. If the number of shares is written in, instead of being inserted by use of the familiar stamp, a check should be made to see that the amount in writing in the body corresponds to the figures in the upper right hand corner.

Signatures of the officers of the corporation and the countersignature of the transfer agent should be canceled on the old certificate, leaving that of the registrar uncanceled. The new certificates are then signed by the transfer agent and again examined to see that all have been countersigned, and then both sets of certificates are sent to the registrar. The work of registrars is discussed in detail in the latter part of this chapter.

BRIEF EXPLANATION OF THE GENERAL LAW OF TRANSFER.—It seems appropriate also to consider briefly the general law of transfer, but it is impossible in this outline to enter into an extended discussion of all the rules governing transfers or to consider at great length the cases relating thereto. A few general cases will be noted and references made to a standard work on corporations. Stock certificates have not been considered as negotiable instruments and the rules laid down in the earlier cases are being modified by customs and practices. It has been intimated that, in states that have adopted the Uniform Transfer Act, stock certificates have acquired a quasi-negotiability.

References hereinafter given to Fletcher are to Fletcher's Cyclopedia of Corporations; the first

number refers to the section, and wherever the section covers several pages the second number is that of the page on which the point of reference is discussed. Each of the points and statements made by Fletcher is supported by the citation of numerous cases. The statements made are general and may have slight modifications in some states.

A stock certificate is not a negotiable instrument, hence a bona fide holder may acquire no better rights therein than were possessed by his transferor. As a general rule, a corporation, in accepting a certificate for transfer and issuing another, accepts the transfer as valid. If the transfer was not lawful, the true owner has recourse against the corporation for permitting the transfer, and the corporation is also liable to an innocent person to whom it issues the new certificate. (Crocker v. Railroad, 137 Mass. 417.) (Fletcher 3779 p. 6292.) (Fletcher 3848.)

A corporation can require the surrender of outstanding certificates before issuing new ones; or the loss or destruction must be satisfactorily proved, or indemnity may be demanded. (Fletcher 3829 p. 6419.)

A corporation need look only to its books to determine who are entitled to dividends. (Fletcher 3802 p. 6349.) The transferee of stock is entitled to recover from the transferor all dividends declared after the date of transfer. (Fletcher 3797 p. 6342.)

A corporation is not obliged to transfer stock held in a fiduciary capacity without a showing, by the party seeking transfer, of the authority of the

fiduciary to make the transfer. (Fletcher 3828 p. 6417.)

Corporations are trustees for stockholders in respect to their stock. (Fletcher 3830 p. 6420.) If a corporation cancels a certificate bearing a forged indorsement the owner is entitled to a new certificate. (Fletcher 3843 p. 6463.) Such owner may bring an action against the corporation or against the person to whom the transfer was made. (Fletcher 3845 p. 6468.)

A bona fide purchaser of a lost certificate, although acting in good faith, acquires no title thereto. (Fletcher 3779 p. 6295; 3834 p. 6433.) If the owner of an indorsed certificate entrusts it to one who violates his trust, an innocent purchaser is protected. (Fletcher 3853.)

Although acting in good faith, a bona fide holder of a certificate indorsed in blank, which the owner has lost, acquires no title against the owner unless such owner has been negligent. (Fletcher 3834 p. 6434.) It has been held that negligence was not shown when the owner of an indorsed certificate placed it in a safe deposit box to which another had access, or when it was placed in a safe to which a trusted employee had access. (Fletcher 3853 pp. 6483-84.)

One who witnesses a forged signature to a transfer power may be held as a guarantor of the signature. (Second National Bank v. Curtis 153 N. Y. 681.) (Bank of England v. Cutler 98 L. T. Rep. 336.) (Fletcher 3852.)

On the death of a stockholder, succession to his stock is governed by the law of the domicile of the stockholder. (Fletcher 3777 p. 6290.)

LIABILITY OF A TRANSFER AGENT TO ITS PRINCIPAL.—All of these rules apply to a transfer agent as well as to the corporation for which it acts. The exact liability of a transfer agent to its principal, for acts of omission or commission, has not been determined by the courts; but, as the agent holds itself out as having special skill, it would undoubtedly be held to a high degree—or more than the ordinary degree—of care. This liability, however, is questioned by some authorities. The wronged stockholder might sue the corporation or the transfer agent, or he might join both in his suit.

In connection with the above points, the opinion of the United States Supreme Court, in the case of Western Union Telegraph Company v. Davenport (97 U. S. 369), handed down in 1878, involving certain principles which are still applicable, said:

> The officers of the company are the custodians of its stock books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of the certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of the power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing a transfer to be made. In either case they must act upon their own responsibility. In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to

purchase property from one who has no title, and who may perhaps have acquired its possession by force or larceny.

Generally speaking, all of the above remarks regarding issues and transfers of stock apply with equal force to the issuance and registry of bonds.

Attention is here directed to the Uniform Stock Transfer Act adopted by some of the states. Such Act, as adopted by the State of Pennsylvania in 1911 is reproduced here as an illustration:

UNIFORM STOCK TRANSFER ACT

To Make Uniform the Law of Transfer of Shares of Stock in Corporations

Section 1. Be it enacted, and so forth, that title to a certificate and to the shares represented thereby can be transferred only,

a. By delivery of the certificate, indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

b. By a delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this Section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

Section 2. Nothing in this Act shall be construed as enlarging the powers of an infant or other person lacking full legal capacity, or of a trustee, executor, or administrator, or other fiduciary, to make a valid indorsement, assignment, or power of attorney.

Section 3. Nothing in this Act shall be construed as forbidding a corporation,

a. To recognize the exclusive right of a person registered on its

books as the owner of shares to receive dividends, and to vote as such owner, or

b. To hold liable for calls and assessments a person registered on its books as the owner of shares.

Section 4. The title of a transferee of a certificate under a power of attorney or assignment not written upon the certificate, and the title of any person claiming under such transferee, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it, another person, for value in good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate with the indorsement of the person appearing by the certificate to be the owner thereof, or shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document.

Section 5. The delivery of a certificate to transfer title in accordance with the provisions of Section 1, is effectual, except as provided in Section 7, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title.

Section 6. The indorsement of a certificate by the person appearing by the certificate to be the owner of the shares represented thereby is effectual, except as provided in Section 7, though the indorser or transferor,

a. Was induced by fraud, duress, or mistake, to make the indorsement or delivery, or
b. Has revoked the delivery of the certificate, or the authority given by the indorsement or delivery of the certificate, or
c. Has died or become legally incapacitated after the indorsement, whether before or after the delivery of the certificate, or
d. Has received no consideration.

Section 7. If the indorsement or delivery of a certificate,

a. Was procured by fraud or duress, or
b. Was made under such mistake as to make the indorsement or delivery inequitable; or

If the delivery of a certificate was made

c. Without authority from the owner, or
d. After the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless:
    1. The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, or,

2. The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.

Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof and, pending litigation, may enjoin the further transfer of the certificate or impound it.

Section 8. Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby.

Section 9. The delivery of a certificate by a person appearing by the certificate to be the owner thereof without the indorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering, to complete the transfer by making the necessary indorsement. The transfer shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

Section 10. An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts.

Section 11. A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants—

a. That the certificate is genuine,
b. That he has a legal right to transfer it, and
c. That he has no knowledge of any fact which would impair the validity of the certificate.

In the case of an assignment of a claim secured by a certificate, the liability of the assignor upon such warranty shall not exceed the amount of the claim.

Section 12. A mortgagee, pledgee, or other holder for security of a certificate who in good faith demands or receives payment of the debt for which such certificate is security, whether from a party to a draft drawn for such debt, or from any other person, shall not by so

doing be deemed to represent or to warrant the genuineness of such certificate, or the value of the shares represented thereby.

Section 13. No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it.

Section 14. A creditor whose debtor is the owner of a certificate shall be entitled to such aid from the courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process.

Section 15. There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate.

Section 16. The alteration of a certificate, whether fraudulent or not and by whomsoever made, shall not deprive the owner of his title to the certificate and the shares originally represented thereby, and the transfer of such a certificate shall convey to the transferee a good title to such certificate and to the shares originally represented thereby.

Section 17. Where a certificate has been lost or destroyed, a court of competent jurisdiction may order the issue of a new certificate therefor on service of process upon the corporation and on reasonable notice by publication, and in any other way which the court may direct, to all persons interested, and upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the corporation or any person injured by the issue of the new certificate from any liability or expense, which it or they may incur by reason of the original certificate remaining outstanding. The court may also in its discretion order the payment of the corporation's reasonable costs and counsel fees.

The issue of a new certificate under an order of the court as provided in this Section, shall not relieve the corporation from liability in damages to a person to whom the original certificate has been or shall be transferred for value without notice of the proceedings or of the issuance of the new certificate.

Section 18. In any case not provided for by this Act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators, and trustees, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern.

Section 19. This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Section 20. A certificate is indorsed when an assignment or a power of attorney to sell, assign, or transfer the certificate or the shares represented thereby is written on the certificate and signed by the person appearing by the certificate to be the owner of the shares represented thereby, or when the signature of such person is written without more upon the back of the certificate. In any such cases a certificate is indorsed though it has not been delivered.

Section 21. The person to whom a certificate was originally issued is the person appearing by the certificate to be the owner thereof, and of the shares represented thereby, until and unless he indorses the certificate to another specified person, and thereupon such other specified person is the person appearing by the certificate to be the owner thereof until and unless he also indorses the certificate to another specified person. Subsequent special indorsements may be made with like effect.

Section 22. (1) In this Act, unless the context or subject matter otherwise requires—

"Certificate" means a certificate of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this Act.

"Delivery" means voluntary transfer of possession from one person to another.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Shares" means a share or shares of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this Act.

"State" includes state, territory, district, and insular possession of the United States.

"Transfer" means transfer of legal title.

"Title" means legal title and does not include a merely equitable or beneficial ownership or interest.

"Value" is any consideration sufficient to support a simple con-

tract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith" within the meaning of this Act, when it is in fact done honestly, whether it be done negligently or not.

Section 23. The provisions of this Act apply only to certificates issued after the taking effect of this Act.

Section 24. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

Section 25. This Act shall take effect on the Second day of January, 1912.

Section 26. This Act may be cited as the Uniform Stock Transfer Act. APPROVED—The Fifth day of May, A. D. 1911

FUNCTIONS OF REGISTRAR RESEMBLE THOSE OF TRANSFER AGENT.—Still another activity of the corporate trust department or trust company is that of acting as registrar for some other corporation. This relationship is closely allied to that of acting as transfer agent and in many textbooks is treated in conjunction with it.

Many corporations, in addition to appointing transfer agents to safeguard the transfers of their stock, employ registrars whose primary duty is so to keep track of the issuance and cancelation of certificates of stock of the corporation which employs them as to prevent an overissue thereof.

It is one of the listing requirements of some exchanges, notably the New York Stock Exchange, particularly if the corporation transfers its own stock, that such corporation have, as registrar, some bank or trust company.

THE NEED FOR REGISTRARS AROSE BECAUSE OF OVERISSUE OF STOCK.—There

are various legends as to why a registrar was first required; all of them are based on the overissue of stock by officers of corporations, whose stock was in speculative demand and very much dealt in, and whose only practicable restraint on the amount of the issue was the inability to obtain certificates. Even in those cases in which the corporation employs a transfer agent, the exchanges look to the registrar rather than to the transfer agent to prevent an overissue.

As a basis for acceptance of the duty of registrar, the trust organization should require the following:

1. Copy of resolutions of the directors of the corporation appointing such trust company or bank as registrar and defining its duties as such, duly certified by the secretary or other proper officers of the corporation

2. Papers similar, in so far as applicable, to those required in the case of a transfer agent, already discussed in this chapter

FIRST DUTY IN RECORDING TOTAL ISSUE.—Generally speaking, as above stated, it is the duty of the registrar to check the issues of stock and prevent overissues thereof. The work of the registrar begins, therefore, after the stock is issued by the corporation or transferred by the transfer agent and before the original certificates or the new certificates are delivered to the owners of the stock.

The first record of the registrar should ordinarily be a record of the original issue of the stock

and it should show the full number of shares authorized to be issued and registered by the corporation. It is then the registrar's duty to see that this total, unless increased by appropriate legal action on the part of the corporation, is not exceeded.

SECONDARY DUTIES IN RECORDING TRANSFERS.—Assuming that all the shares of stock originally authorized have been duly issued, by the corporation itself or through the medium of its transfer agent, and that a record has been made thereof by the registrar, its duties thereafter relate to checking and recording transfers of such stock. After the corporation or the transfer agent, as heretofore stated, has issued a new certificate, canceled the old one, and entered the name and address of the stockholder, certificate number, and number of shares in the stockholders' ledger, the old and the new certificates are then sent to the registrar. The registrar balances the new certificates against those canceled and makes an appropriate record of the numbers of the certificates canceled and issued and of the number of shares represented by each. The old certificates are also canceled by the registrar. This cancelation is in addition to that of the transfer agent. The registrar countersigns the new certificates, which are then usually returned to the transfer agent for delivery or are sometimes delivered against the receipts of the transfer agent. After the registrar has examined and mutilated the canceled certificates, they are returned to the transfer agent for filing.

RESPONSIBILITIES OF REGISTRAR ARE WELL DEFINED.—Although, as above intimated, corporations may—and often do—transfer their own stock, the registrar must be a distinct entity. The transfer agent assumes the duty of passing on the validity of original issues or transfers; the registrar merely checks the number of shares represented by each set of certificates to see that they balance. It is not generally considered to be responsible for any of the details of transfer, that is, validity of signatures to transfer powers, payment of taxes, and so forth. The registrar's responsibility is limited to guaranteeing that the certificate registered represents shares within the number authorized to be issued. The only record ordinarily kept by the registrar, therefore, is one showing the stock, the total number of shares authorized to be issued, the total number of shares actually issued, the certificate numbers, and the number of shares represented by each certificate issued or canceled.

As the registrar is not generally assumed to be responsible for the authority under which transfers are made, its duties are comparatively few and simple. Summarized, they are briefly as follows:

1. To examine canceled certificates to see that they bear the correct signatures of the officers of the corporation, the transfer agent, and also of the registrar

2. To see that the face of the certificate has not been altered; that is, that no change has been made in the name of the person to whom issued nor any

increase, known as raising, made in the number of shares

3. To balance shares shown by old and new certificates

4. To see that new certificates are properly signed by the corporation and the transfer agent

5. To cancel the signature of the registrar on the old certificates

6. To countersign new certificates and deliver them to holders of receipts issued by the transfer agent, or to return the new certificates to the transfer agent for delivery

7. To return to the transfer agent its old certificates and receipts

The forms in use by registrars throughout the country are quite varied, although not very complex. A series of such forms will be found in Work of Corporate Trust Departments, by Page and Gates, to which the student is referred for a further study of the subject.

ADDITIONAL RECORDS REGARDING BONDS AND CERTIFICATES.—In addition to registration of issues of stock and transfer thereof, registrars are sometimes called upon to record issues and transfers of bonds, of certificates of deposit, and of voting trust certificates. These duties and records are practically the same as those respecting registration of stock certificates. In the cases of registration of certificates of deposit and of voting trust certificates, the appointment of a trust company or bank originates with the protective or reor-

ganization committee or voting trustees. The dealings of the registrar, therefore, instead of being with the transfer agent, are with the depositary for the committee or with the agents for the voting trust.

USUAL PRACTICE REGARDING LOST CERTIFICATES.—This subject would not be complete without a brief review of the law and practice regarding lost, destroyed, or stolen stock certificates. It will be assumed that, as soon as the owner of the certificate becomes aware of the loss, inadvertent destruction, or theft of his certificate, he will immediately notify the corporation accordingly. The corporation, in turn, should notify the transfer agent, or the registrar, or both. Some corporations and exchanges have devised very elaborate rules and regulations regarding the issue of duplicate certificates; and very properly so, because, as a general principle of law, if such certificate is properly transferred to an innocent holder for value, such holder is entitled to the stock as against the prior owner. The twofold question as to who would be responsible for the loss suffered by the prior owner and who would be compelled to bear it, is one of fact and of law; it is too intricate to discuss in detail here, except to say that ordinarily that person would suffer whose negligence or wrongful act had made the loss possible.

BOND OF INDEMNITY AND ISSUE OF DUPLICATE CERTIFICATES.—The by-laws of most corporations provide for the issue of duplicate certificates of stock upon compliance with certain

requirements. These stipulations are, usually, that the stockholder advertise his loss in one or more newspapers, one or more times; and, if the certificates are not recovered, that he give appropriate indemnity to protect the corporation, the transfer agent, and the registrar against loss by reason of the issuance of a duplicate certificate. If the corporation feels satisfied (1) that the stockholder has lost his certificate or that some one has destroyed or stolen it, (2) that he, the stockholder, is still the true owner thereof, (3) that he has complied with the requirements of the by-laws of the corporation or with the usual practice in such cases, and (4) that it, the corporation, is willing to issue a duplicate certificate upon being properly indemnified, then the transfer agent and the registrar will be so notified and a duplicate certificate will be issued accordingly. All the rules above outlined, regarding the issuance, transfer, and registration of certificates, will, of course, be duly observed. One of the conditions precedent to the issuance of such duplicate certificates is the giving of a bond of indemnity to be executed in three counterparts (triplicate)—one for the corporation, one for the transfer agent, and one for the registrar. The amount of the bond should usually be double the market value of the stock at the time of the issuance of the duplicate certificate. This high figure is set because the basis of loss due to the improper issue of stock is ordinarily the market value of the stock at the time the innocent holder for value attempts to deal with his

stock and finds a duplicate certificate has been issued. Bonds of indemnity differ very much in detail, but the following is fairly illustrative of the forms generally used:

(Form of Bond of Indemnity)

KNOW ALL MEN BY THESE PRESENTS, That we, Samuel Brown, individually and as administrator of the estate of John Smith, of Chicago, State of Illinois, and Oxford Indemnity Company of New York, New York, a corporation of the State of New York (hereinafter called the Obligors) are severally held and firmly bound unto Manchester Utilities Company, a corporation of the State of New York, and the Institute Trust Company of Philadelphia, a corporation of the Commonwealth of Pennsylvania, Transfer Agent, and the First Trust Company, a corporation of the State of New York, Registrar, in the sum of One Thousand ($1,000) Dollars, lawful money of the United States of America, to be paid to said Obligees, their certain Attorney, Successors, or Assigns; to which payment well and truly to be made, we do bind and oblige ourselves and each of us, our several and respective Heirs, Executors, Administrators, and Successors, firmly by these presents. Sealed with our seals. Dated the First day of June in the year of our Lord One Thousand Nine Hundred and Twenty-six (1926).

THE CONDITION OF THIS OBLIGATION IS SUCH, That, Whereas Certificate No. 1000 for five (5) shares of Preferred Stock of Manchester Utilities Company was duly issued unto the said John Smith who died some time during the year 1925 and on whose estate letters of administration were granted July 10, 1925 to Samuel Brown, the individual Obligor herein; WHEREAS, it is represented and alleged by the individual Obligor herein that to the best of his knowledge and belief the said Certificate of Stock No. 1000 was originally among the papers in the estate of John Smith and that it was seen among them frequently, but for the past six months, notwithstanding the fact that careful search has been made by the said individual Obligor, the Certificate of Stock cannot be found; WHEREAS it is further represented and alleged by the said individual Obligor that he has not in any way sold, pledged, assigned, or transferred said Certificate of Stock nor any interest therein, to any person or persons, and that he does not know the whereabouts of the said Certificate, and that he is still the owner thereof, without right of any other person or party in and to the same, and that he requests hereby that a new Certificate shall be issued to him, as Administrator, for the five (5) shares of Preferred

Stock of the said Manchester Utilities Company to which he may be entitled; WHEREAS, the said Obligee, Manchester Utilities Company, has expressed its willingness to issue a new Certificate in place of the Certificate so as aforesaid represented to have been lost, and the said First Trust Company has expressed its willingness to register said new Certificate of Stock so to be issued as aforesaid by the said Obligee, Manchester Utilities Company, and the Institute Trust Company of Philadelphia has expressed its willingness as Transfer Agent of the said Manchester Utilities Company, to transfer in due course of business said new Certificate of Stock so to be issued as aforesaid, when lawfully requested so to do, upon condition that this present Bond should be now made, executed, and delivered to the said Obligees:

IF THEREFORE, Said Obligors or either of them, their or either of their Heirs, Executors, Administrators, or Successors, shall and do deliver up said original Certificate of Stock hereinabove recited, when and if same shall come into their or either of their hands, unto said Obligees, their Successors, or Assigns, to be canceled, and until the same shall be so delivered up and canceled, save, defend, keep harmless, and indemnify said Obligees, their Successors and Assigns, and their and every of their goods and chattels, lands, and tenements, of, from, and against said original Certificate of Stock hereinbefore first recited, and of, from, and against all actions, suits, payments, costs, charges, loss, and damage of every kind or nature whatsoever, for or by reason thereof, then this obligation is to be void, or else to be and remain in full force and virtue.

Executed this First day of June, A. D. 1926

Signed, Sealed, and Delivered :	SAMUEL BROWN (Seal)
by SAMUEL BROWN :	SAMUEL BROWN (Seal)
individually and as Administra- :	Administrator of the Estate of John
tor of the estate of John Smith :	Smith, deceased
in the presence of us :	Oxford Indemnity Company
WALTER FRANK :	by SAMUEL WOLF
OSCAR JONES :	President
Sealed and Delivered by the :	Attest: EDWARD ROBERTS
Oxford Indemnity Company in :	Secretary
the presence of us :	
ALEXANDER MACK :	
JOSEPH TRANCK :	(SEAL)

CITY OF CHICAGO : }ss.
STATE OF ILLINOIS : }

Samuel Brown, being duly affirmed according to Law, doth depose and say that he is the individual Obligor named within; that the facts

recited and warranted by him in the within Bond are true; and that this affidavit is made for the purpose of inducing Manchester Utilities Company, the Institute Trust Company of Philadelphia, Transfer Agents, and the First Trust Company, Registrar, to deliver to him, as Administrator, a Certificate of Preferred Stock of Manchester Utilities Company, without requiring that he shall first deliver unto Manchester Utilities Company, the Institute Trust Company of Philadelphia, Transfer Agents, and First Trust Company, Registrar, Certificate No. 1000 for five (5) shares of Preferred Stock of Manchester Utilities Company, issued by them to John Smith, of whose estate he is Administrator.

Affirmed and subscribed before me
this First day of June, A. D. 1926

HAROLD PETTIT
Notary Public for the State of
Illinois
(SEAL)

SAMUEL BROWN

The above remarks also apply, except of course as to certain details, to the issuance of duplicates in cases of lost bonds, certificates of deposit, voting trust certificates, and the like.

CHAPTER XIV

Corporate Trusts (Continued)

IN addition to acting as transfer agents and registrars of corporations, there are several other kinds of service which trust companies or banks undertake in behalf of corporations or their stockholders and bondholders. These functions will be considered in some detail in this chapter.

Depositaries, Reorganizations, Fiscal Agencies, Voting Trusts

DEFINING THE TERMS DEPOSITARY AND DEPOSITORY.—First, as to a bank that acts as depositary. In this connection, it seems well to call attention to the ordinary use of the terms "depositary" and "depository." They are frequently used interchangeably to designate either a bank or a person with whom personal property is left or deposited. It is more accurate, however, to use the word "depository" as the place where the deposit is kept and "depositary" as the person or party receiving the deposit.

TWO FUNCTIONS AS DEPOSITARY.—As the term "depositary" is used by trust companies and banking institutions, it refers to the holding of securities in reorganizations or consolidations of corporations; or the term applies in the case of the committee of security holders appointed, with re-

spect to the securities deposited, after there has been a default.

In cases of reorganizations *ab initio* (from the beginning) and of consolidations, the securities are deposited under definite instructions as to their disposition; when deposited in cases of default, they are usually subject to the order of a committee representing the holders of such securities. In either event, they are not subject to withdrawal by the depositor without the consent of the party requesting the deposit.

At this time, only such duties and responsibilities of a trust company or bank, acting as a depositary for security holders, as apply in cases of default under a corporate obligation, will be considered.

DEPOSITARIES NOT DEFINED BY STATUTE.—As a rule, there is no statute authorizing banks or trust companies to act as depositaries; that function is generally considered as coming within the category of an agency. No particular form of agreement is necessary; it may be a formal instrument or it may be merely in the nature of a letter of instructions. When securities are deposited the bank or trust company, as depositary, issues a receipt to the depositor, fully describing the items deposited, with a general statement of the terms under which they are to be held. These receipts are usually so prepared that they may be transferred by indorsement—a form, similar to that on the reverse side of a stock certificate, being printed on the back of the certificate of deposit. In

making such transfers, practically all the formalities outlined in Chapter XIII with respect to transfers of stock must be carefully observed. In this connection, it may be stated that the term "depositary receipts" is less confusing than "certificates of deposit" which, in common parlance, means the receipts usually issued by a bank evidencing the deposit of money on which interest is paid.

ADVANTAGES OF COMMITTEE DEALINGS.—Naturally, the duties of a depositary vary with the terms of the agreement of deposit or the letter of instructions, and most of the dealings of the depositary are with the committee of security holders. The necessity for the relationship usually arises when a corporation gets into financial difficulties, in which event prominent or large security holders organize a "protective committee" and request the holders of securities affected to deposit them with the depositary selected by such committee. The security holders may then, through the committee, act as a unit in protecting their investments. In foreclosures, it would be impracticable to begin proceedings unless a substantial amount of the bonds were represented by the parties plaintiff, that is, the parties beginning the proceedings in foreclosure. Similarly, when a corporation has many kinds and classes of securities outstanding, committees representing the numerous sets of security holders may meet together, and they may often thus get action that could not be had if it were necessary to consult with a large number of individuals.

FORMALITIES OF COMMITTEE WORK.—When the committee is chosen and organized, it works out a plan of procedure which is put in proper legal form by counsel. The plan thus formulated is in the nature of a deposit agreement and is sent to the various security holders with a letter of explanation. The depositary is also supplied with a copy of the deposit agreement. If any security holder wishes to deposit his securities under the agreement, he forwards them to the depositary and receives therefor a receipt as above stated. This "depositary receipt" recites that the securities therein enumerated have been deposited under an agreement among (1) certain individuals acting as a committee, (2) the depositary, and (3) holders of securities who may deposit them under the agreement; and, further, that the receipt is subject to all the terms of the plan, the original of which is on deposit with the depositary. The older practice was to have each depositor sign an agreement and forward it with his securities. This plan, however, resulted in creating very bulky files, and the general method above outlined was found to be just as effective and much less cumbersome.

SECURITIES HELD AND EXPENSES MET ON COMMITTEE'S DEMAND.—The depositary holds the securities usually subject to the orders of the committee and for the purposes set out in the deposit agreement. The records kept by the depositary are quite simple and show merely the name of the particular corporation involved, the

names of the persons depositing their securities, a description—usually the number of such securities—and the date of the deposit.

At present, we are assuming that the deposit was made for the purpose of foreclosure only and that the plan agreed upon contemplates no other action. One of the difficulties or unusual duties often confronting a depositary in such cases is that of being called upon to advance money to defray the expenses of the committee or of the foreclosure proceedings. Under such circumstances, the depositary should insist upon being given a prior lien on the particular securities deposited with it. In other cases, the depositors are called upon to pay assessments to meet the same expenses.

DEPOSIT AGREEMENTS AND FORECLOSURE PROCEDURE.—If the foreclosure is pushed to a conclusion and if the corporate property, covered by the instrument securing the bonds in question, is sold at a judicial sale and, furthermore, if the fund derived is received by the trustee, then the securities deposited, upon surrender of the depositary receipts given therefor, are usually returned by the depositary to the several depositors or their assignees. The security holders then surrender to the trustee their securities or bonds, with all unpaid coupons thereto attached, and receive their proper proportion of the fund realized as aforesaid.

CONTROL BY COMMITTEE.—The deposited securities may, at the direction of the commit-

tee, be delivered to the trustee by the depositary, and the funds to which such securities are entitled may be paid to it and by it paid to the holders of receipts on the surrender thereof.

It may also be said, in this connection, that in defaults the committee usually has full control of the securities. The following is a typical example of the language used in agreements made with committees:

> The committee is hereby vested under the terms of this agreement as trustees of an express trust, with the legal title and ownership of all the bonds which may be deposited. . . . The committee may exercise each and every power and authority vested in the bondholders by the terms of the mortgage.

The agreement further provides that the committee shall have power to cause the foreclosure of the mortgage which secures the deposited bonds, to apply for a receiver, and to consent to the issue of receivers' certificates which shall be a lien superior to the bonds. Authority is also given to buy in the mortgaged property at the foreclosure sale or to sell to or exchange the property or bonds, to adopt plans for reorganization, and to borrow money with the deposited bonds or the mortgaged property as security. On the consummation of any plan, the committee is to distribute any securities or cash to the depositors on surrender of depositary receipts. Many agreements provide that, if any plan other than a foreclosure is adopted, notice of such plan shall be given to the depositors and that, if they or any of them dissent, such dissenters shall have the

right, on giving notice to the committee and on paying their share of the expenses incurred to that time, to withdraw their securities. The amount of such expenses is usually limited to a percentage of the par value of the deposited securities. The depositary has no discretionary powers and cannot, without the consent of the committee, accept conditional deposits or deposits which are at variance with the agreement.

AGREEMENT USUALLY INCLUDES REORGANIZATION.—Very few depositary agreements contemplate merely foreclosure; they usually provide also for some form of reorganization, which is the plan most likely to be suggested. While reorganizations, as that term is sometimes used, do not always grow out of defaults or financial difficulties of the corporations involved, they usually do so if they are decided upon as a financial advantage to the corporation and its security holders. They are generally spoken of as readjustments.

REORGANIZATIONS.—The work of the depositary in connection with reorganizations will now be considered. In such cases, plans are worked out by a committee, as already outlined, with respect to plans for foreclosure, but usually more in detail as to the time limit for deposits, the securities to be received in exchange, and the like.

The depositary holds the securities usually subject to the orders of the committee for the purposes set out in the deposit agreement. If the plan is not carried out or if material changes are made, an ex-

tension of time is asked or a consent to a changed or modified plan is secured. A depositor not assenting may withdraw his securities, on paying his share of the expense incurred by the committee to the date of the change.

SURRENDERED OR LOST RECEIPTS.—On the completion of the reorganization or foreclosure, new securities and/or cash are distributed to depositors on surrender of receipts; in fact, such surrender should always be required before payment or delivery. While the receipts may not be negotiable and the depositary will not be liable to innocent purchasers after delivery or payment under the plan, much confusion and correspondence may thus be avoided. Few holders destroy such receipts, and years afterward heirs or personal representatives find them among the effects of a decedent and write to the issuer for information. Much time is wasted digging through old files to determine whether or not payment or delivery has been made against the particular receipt. If taken up and canceled, such inquiries will not later be received. If a receipt is lost, the claimant should be required to furnish an affidavit as to loss and a satisfactory bond to cover possible claims that may be made by one who may be or who claims to be a bona fide holder. In this connection, see Chapter XIII regarding issuance of duplicate stock certificates after the originals have been lost, destroyed, or stolen.

OUTLINE SUMMARY.—At this point it seems appropriate that a summary of a depositary's

functions in connection with a deposit for foreclosure or reorganization be briefly outlined:

1. A duly executed counterpart of the deposit agreement should be held as evidence of the agreement between the parties and as evidence of the appointment of the depositary, with an adequate supply of copies thereof for distribution.

2. Copies of the notice of the contemplated foreclosure or reorganization and of the publication thereof should be lodged, and, in addition, a supply should be kept of copies of any circular letter which may have been issued by the committee.

3. An opinion of counsel, as to legality of the forms, the agreement, and the plan contemplated, should be kept.

4. An acceptance of deposits under the agreement and plan should be executed.

5. Records should be kept of such deposits.

6. Records should be kept of transfers or registrations.

7. A list of depositors should be furnished when required by the committee.

8. Those who have not deposited their securities should, upon inquiry, be properly advised as to their technical rights, but all communications should be under the supervision of counsel and the committee.

9. When the plans for the reorganization have been fully and finally completed, the securities, stock, or cash to be issued or paid, in place of those deposited, should be distributed. Such new securi-

ties, stock, or cash will be delivered or paid, of course, only on surrender of the depositary receipts that were given to the security holders when their securities were deposited and upon payment of assessments, if any, imposed by the plan of reorganization. The depositary will then cancel the depositary receipts as they are surrendered, in exchange for new securities, stock, or cash, and he will credit the new or reorganized corporation with assessments as received.

FINAL DUTIES OF DEPOSITARY.—When such reorganization is thus consummated and the new securities and so forth delivered or paid, as the case may be, the work of the depositary is practically completed, except that it should require of the committee final instructions, regarding the disposition of such securities and other documents relating to the reorganization as may be in its possession or of those which may later come into its possession. It is usual for such committee to direct the disposition to be made of the deposited securities and records, often requiring that they be delivered to the new company; also, to direct that the canceled depositary receipts be cremated after a certain period of years.

PRIVILEGE OF DEPOSIT UNDER REORGANIZATION.—It may be stated, as a general proposition of law, that those security holders who do not avail themselves of the privilege of depositing their securities, under an agreement and plan of reorganization in foreclosure, after due notice that such reorganization is to take place after a foreclos-

ure, are not entitled to participate in such reorganization. In most cases, deposits are accepted, upon condition that specified payments be made, even until final consummation of the reorganization plan.

SUMMARY OF DEPOSITARY RECORDS.—The records kept by depositaries in reorganizations are quite simple, but varied, and no really typical forms can be set out here. They usually consist of lists of deposits made; often, also, of separate sheets or cards for each depositor; of lists of depositary receipts issued, including the names and addresses of the depositor and records of transfers and registrations; and of records of the issues of the new securities, frequently transferred to the separate sheets or above-mentioned cards; in other words, such cards show the original securities deposited and also show the new securities, stock, or cash delivered or paid in lieu thereof. A sample set of such records appears in Work of Corporate Trust Departments by Page and Gates, of which mention has already been made herein.

CONSOLIDATIONS AND OTHER VOLUNTARY AGREEMENTS.—Trust companies and banks may be called upon to act as depositaries in connection with consolidations or mergers of corporations, or readjustments or other voluntary rearrangements of the capital or financial structure of corporations. Reorganizations usually grow out of financial difficulties that make it necessary for some of the security holders or stockholders to form a committee for the protection of their interests; that

is, a reorganization is in the nature of an involuntary readjustment, whereas consolidations, mergers, or other readjustments are usually voluntarily agreed upon in advance, and the depositary is used to effectuate a plan which is approved by the mere deposit of securities. With this technical exception, the duties of a depositary with respect to consolidations, mergers, and other readjustments of corporations are the same as in cases of reorganizations.

FISCAL AGENTS FOR CORPORATIONS.—In quite a number of cases, trust companies or banking institutions are called upon to act as fiscal agents for corporations. This function will now be considered. These agencies usually apply to cases in which a bank or trust company is called upon to act for a corporation in the payment of corporate obligations—usually the payment of interest represented by coupons attached to bonds or interest or registered bonds—and, in some cases, it applies also to the payment of dividends.

Let us consider a bank or trust company acting as fiscal agent for the payment of coupons and registered interest.

As Agent for Payment of Coupons and Registered Interest

HOW APPOINTED.—The appointment of a trust company or bank as such fiscal agent is usually by a resolution of the board of directors of the corporation which has issued the bonds, the coupons

attached to which are to be paid, duly appointing the trust company or bank as its fiscal agent for that purpose. A duly certified copy of such resolution should, of course, be furnished to the trust company or bank so appointed as such fiscal agent.

VARIOUS DUTIES.—Assuming that such appointment has been duly made and authenticated, the work of the fiscal agent may then be considered as involving generally (1) the payment of coupons as presented or the payment of interest on the bonds which are registered; (2) the accounting to the corporation for payments made; and (3) the keeping of such records and performing such services as may be required of the corporation under the Federal Income Tax Law and regulations; also (4) it may involve the payment of dividends and keeping a proper record thereof.

In the case of payment of coupons and registered interest, the bank or trust company may be called upon to make such payments, with respect to corporations for which it is acting as fiscal agent, and also in cases in which it is acting as the trustee under a mortgage or trust deed securing bonds.

ACQUIRING NECESSARY FUNDS BEFORE MATURITY.—Having undertaken to act as such fiscal or paying agent, the first duty of the bank or trust company is to require that the corporation debtor shall deposit with it, prior to the due date of the coupons or registered interest, a sum of money sufficient to pay all coupons maturing on that date. Any failure to place in the paying agent's hands, in

due time, an amount sufficient to pay coupons or interest on the due date amounts to a default. It is not unusual, nor, on the other hand, is it the universal practice, to require that funds, as aforesaid, shall be in the hands of the paying agent at least ten days before the due date.

WHEN OWNERSHIP CERTIFICATES ARE REQUIRED.—When coupons are presented for payment, they should be accompanied by the proper forms of ownership certificates, as required by the provisions of the existing income tax act and the regulations thereunder. If the bonds, however, from which such coupons have been detached contain no "tax-free covenant" clause, or if they belong to corporations, no ownership certificates are now required. If the bonds belong to individuals or fiduciaries whose intention is not to claim exemption, and if they contain tax-free covenant clauses, then ownership certificates—Forms 1000 or 1000A (both white forms), depending on whether or not the taxable income of the taxpayer for the year is over $4,000 or is $4,000 or less—must accompany the coupons. If exemption is claimed, the yellow Form 1001 should be used.

WHEN BONDS ARE TAXABLE.—If Form 1000 is used, the debtor corporation is bound to pay the Federal Government a 2% tax on the coupons paid; if Form 1000A is used, only a 1½% tax need be paid by such debtor corporation. If Form 1001 is used, no tax need be paid by such corporation. Whenever the tax is due and payable

by the debtor corporation at the source, the amount so paid is deductible by the owner of the bonds from the net income tax shown to be due by his return for the year. While it should be the desire of individuals and fiduciaries to relieve the debtor corporations from paying taxes with respect to bonds issued by them, there is no objection to be urged against the taxpayer if he resolves every doubt in his own favor and files certificates claiming the benefit of the maximum tax to be paid at the source. In fact, except in a very few cases, taxpayers are unable to estimate a year in advance what their incomes may be.

SIMILAR RULES REGULATE REGISTERED INTEREST.—The rules and regulations regarding filing of ownership certificates with coupons presented for payment also apply, with equal force, to payments of registered interest. In the latter instance the paying agent sends out forms in advance at each interest period to apply to the payments to be made at the following period. As the requirements regarding ownership certificates are changing from time to time, it does not seem wise to go into the matter more fully here. The student should familiarize himself with the law and regulations and the various forms of ownership certificates required to be used. These forms are always available and contain clear instructions regarding their use. No good purpose would be served if an attempt were made to reproduce them here.

FORM OF ENVELOPE.—Another practice

that is quite prevalent, regarding presentation of coupons for payment, is to require that they shall be placed with the appropriate ownership certificates in envelopes, specially prepared by the trust company or bank for that purpose, and that only one kind of coupon shall be in any one envelope. These envelopes usually have printed on their faces the following:

Enclose Only One Kind of Coupon in Each Envelope, Accompanied by Proper Income Tax Ownership Certificate

INSTITUTE TRUST COMPANY

.....

Name of Coupons

.....

.....Coupons @ $..... each : $..... : .....

..... " @ $..... " : $..... : .....

Due .....

Payable at .....

Deposited by .....

(If not paid please return in this envelope with reason)

If the paying agent does not act as fiscal agent under the Federal Income Tax Law—that is, if the paying agent is not the one to make the returns hereinafter mentioned—the canceled coupons and the ownership certificates are retained in the payment envelope and sent to the fiscal agent aforesaid for the purpose of listing and making proper returns to the Commissioner of Internal Revenue at Washington, D. C. The fiscal agent so receiving coupons and ownership certificates should, of course, recount and recheck the same and give its receipt therefor.

REPORTS OF PAYMENTS.—As coupons are presented for payment, and are paid in cash or by

check they are then duly canceled and held until all the coupons of that maturity are duly presented and paid. The ownership certificates received with coupons presented, as well as those received with respect to registered interest paid, are retained until reported, as hereinafter stated. With respect to registered interest, it is the practice for the paying agent to forward appropriate checks to the holders of registered bonds, in time to be received by such holders, not later than the due date of such interest. As each set of coupons or each amount of registered interest is paid, it is the practice of the fiscal or paying agent to send a report to the debtor corporation for which it is acting. In some instances this report is sent periodically; *i. e.*, every month, quarterly, or at other stated periods. The following illustration will serve to indicate the character of such a report:

INSTITUTE TRUST COMPANY

Record for Month of 1927

Fairbanks Company, Debtor Corporation

Day of Month	Owners of Coupon or Registered Interest	Address	Amount Paid	Amount Tax Withheld	Ownership Certificate Form Number	Due Date

MONTHLY RETURNS.—On or before the twentieth day of each month, the paying agent, or the fiscal agent under the Federal Income Tax Law, must file a return, Form 1012, with respect to coupons or interest paid during the preceding month.

This form is entitled, Monthly Return of Income Tax to Be Paid at Source on Interest Derived from Bonds and Similar Obligations of Domestic and Resident Corporations. It must be accompanied by certificates on Forms 1000, 1000A, and 1001 and must be filed with the Commissioner of Internal Revenue, Sorting Division, Washington, D. C., on or before the above-mentioned day. This form contains very full instructions and should be studied by the student in order that he may become thoroughly familiar therewith.

ANNUAL RETURNS AND TAXES.—In addition to Form 1012 to be filed each month as indicated, the fiscal agent must also file another return, Form 1013, entitled, Annual Return of Income Tax to Be Paid at Source on Interest Derived from Bonds and Similar Obligations of Domestic and Resident Corporations; Form 1013 should be filed with the Collector of Internal Revenue, for the district in which the fiscal or withholding agent is located. This annual return must be filed on or before the fifteenth day of March of the year succeeding that during which the coupons or registered interest in question were paid and the tax withheld; and the tax shown by said return to be due must be paid on or before the fifteenth day of June of the year in which the return was due. This return, Form 1013, is a summary, by months, of the monthly returns, Form 1012; it shows totals, less certain adjustments, and the net amount of tax to be assessed and paid. This return, Form 1013, also contains, on its face,

complete instructions as to its use. The necessity of making the returns and payments aforesaid involves, of course, the keeping of appropriate records. Usually these records consist of a retained copy of the returns made and an account of the tax withheld and to be paid. The amount of such tax, with respect to bonds containing tax-free covenant clauses and belonging to individuals or fiduciaries not claiming exemption, must be paid by the debtor corporation; and the amount thereof should, at the proper time, be deposited by it with its fiscal (or withholding) agent, to be paid over to the Government in due course.

DISPOSITION OF CANCELED COUPONS.—The coupons having been paid and canceled and the reports and returns having all been made, the next question arising concerns the disposition to be made of such canceled coupons. The practice varies. Some trust organizations place them in their vaults until all coupons or registered interest has been finally paid and all outstanding bonds have been fully paid off and canceled. Some fiscal agents cremate such coupons at fixed intervals and issue cremation certificates setting forth that coupons bearing certain numbers and dates have been duly cremated; others cremate the entire number of coupons and bonds, after all of those in a certain issue have been fully paid, and issue cremation certificates accordingly. When cremation takes place it is witnessed by an officer of the bank acting as fiscal agent and by at least one other officer or an em-

ployee of the bank so acting, and the certificate is executed and witnessed accordingly. In some instances, a representative of the debtor corporation is also asked to be present at the cremation.

As Agent for Payment of Other Bonds

CALLED OR MATURED BONDS.—Fiscal agents, as already intimated, not only pay coupons and registered interest, but also they are often called upon to attend to the payment of maturing or called bonds, upon being supplied with funds to do so by the debtor corporation. A proper account is kept of the receipts and disbursements in this regard. In Chapter XII, dealing with trustees under corporate mortgages or trust deeds, will be found certain observations regarding matured or called bonds and coupons thereon, to which the student is referred.

As Agent for Payment of Dividends

ON STOCK OF ANOTHER CORPORATION.—Another service undertaken by banks and trust companies acting as fiscal agents is that of paying dividends on the stock of another corporation. This function involves the sending of checks to the stockholders, on the basis of their holdings as of a certain date. The bank or trust company should be furnished with a duly certified copy of the resolution of the board of directors, appointing it as an agent for the purpose of paying dividends. It should also be furnished with a duly cer-

tified copy of the resolution of said board of directors, declaring such dividend. This second resolution should show as of what date the books are to be closed to the stockholders who are to be entitled to receive dividends as of that date; also, it should show on what date the dividend is to be paid and at what rate per share of stock. The fiscal agent should also be furnished with a duly certified copy of the names of stockholders, as of the date mentioned, with their addresses and the shares owned by them respectively. The fiscal agent should then be supplied with sufficient funds, in ample time to enable it to make payment on the due date of said dividends to said stockholders. This payment is usually made by sending checks in ample time to reach the stockholders on the due date if they reside within a reasonable distance—as, for instance, within one day's mailing of the office of the fiscal agent. A proper record of the payments made should be kept and should be checked against the list furnished to the fiscal agent by the corporation; and a statement of such payments should be sent to such corporation.

FEES OF FISCAL AGENTS.—The fees for acting as fiscal agents vary. Some banks and trust companies make no charge, provided the funds to be disbursed are deposited with them, without interest, at least thirty days before the due date of the coupons, interest, or dividends; in some instances, even less time is acceptable. When fees are charged, they are usually figured on a basis of about ¼% of the amount disbursed at any interest period;

or, when dividends are paid, they may be based on the number of checks needing to be sent out. In the latter case, the fee per check decreases as the number of checks increases. There is no uniformity in regard to these charges.

As Agent under a Voting Trust Agreement

A VOTING TRUST IS A MEANS OF CONTROL.—Another function to be mentioned is that of acting under a voting trust agreement, commonly called a "voting trust." It is another form of agency. This activity arises out of a desire to provide for the control of a corporation or the pursuit of a certain policy over a period of years. In order to accomplish such control or to fulfil such policy, stockholders are requested to deposit their stock with voting trustees. The stock deposited is transferred to the names of the trustees, and the interests of the depositing stockholders are evidenced by voting trust certificates. These certificates recite that the person to whom they are issued is the owner of a stated number of shares of stock held by the trustees, under an agreement; and that, at a certain time, upon surrender of the voting trust certificates, the owner will be entitled to receive the number of shares of stock represented by the respective certificates. Provision is made that holders of the certificates shall receive payment of dividends on the deposited stock, when and if dividends are received by the trustees.

Having title to the stock, the voting trustees, by

their votes at stockholders' meetings, may elect a board of directors favorably inclined to their aims and purposes and thereby control the policies of the corporation.

VALIDITY OF VOTING TRUSTS.—In general, voting trusts have been held by the courts to be valid, provided they were not formed for illegal purposes. The fact that the stock is held and voted by the trustees, in their discretion, and that the equitable owners of the shares have no control over them does not make the agreement void. (Cook on Corporations, Section 622.)

For convenience in administration, the voting trustees (not the corporation) usually appoint a trust company or bank as agent. Such agent has power to issue trust certificates in the names of the trustees, on original issue as directed by the trustees, and thereafter on the surrender for cancelation of outstanding certificates properly indorsed.

PAYMENT OF DIVIDENDS.—Dividends received by the trustees may be either distributed by the trust company or bank as agent, or they may be mailed by the corporation, at the direction of the trustees, direct to the holders of voting trust certificates, whose names have been previously ascertained by the corporation from the agent of the trustees.

SIMILARITY OF VOTING TRUST AND STOCK TRANSFER AGENCIES.—The duties of a bank or trust company as agent are similar to those of a stock transfer agent. Voting trust cer-

tificates are issued in the same manner as are stock certificates; the transfer thereof is guided by the general laws and practices regarding transfers; and the records are the same.

On the expiration of the voting trust, it is dissolved. The stock is issued to the persons holding the voting trust certificates, on the surrender thereof. If it is thought to be desirable to continue the trust, certificate holders are requested to assent to a continuance or a renewal of the trust.

As intimated, the stock is deposited with the voting trustees, under an agreement between such trustees and such stockholders as may deposit their stock under the terms of such agreement, and as may accept voting trust certificates, as aforesaid, in exchange for their stock so deposited.

EXTENT OF CONTROL BY STATUTE.—Voting trusts, as to terms and duration, are in some states controlled by statute; *e. g.*, in New York the time is ten years. In some states a lesser period is prescribed, whereas in others "a reasonable time" is the rule applied.

USUAL PROVISIONS IN CERTIFICATES.—The forms of voting trust certificates vary considerably. Usually they recite that on a certain date a certain stockholder will be entitled to receive a certificate in exchange for the stock deposited by him; that he will be entitled to receive any dividends collected by the voting trustees to whom all the stock deposited is assigned; and that the voting trustees, during the term of the agreement, are au-

thorized to exercise all rights and powers over said stock as absolute owners thereof. It is also recited that the rights of the certificate holder are subject to the terms of the voting trust agreement of a certain date, filed with the bank or trust company which is acting as agent for the voting trustees. It is also provided that the certificate issued shall be transferable only on the books of the voting trustees, in the manner usually applicable to transfers of stock. The certificates are usually signed, in behalf of the voting trustees, by the bank or trust company as their agent.

CHAPTER XV

Organization of a Trust Company or Department—Development of Trust Business—Uniform Fiduciaries Act

SO many outlines have appeared and such a large number of charts have been published with the purpose of showing how a trust company or the trust department of a bank or other financial organization should be constituted, that it seems but a vain repetition to attempt another outline. It is felt, however, that this text would not be complete without some such outline and some observations in explanation or enlargement thereof.

DIVISIONS OF A TRUST DEPARTMENT.—It is quite generally conceded that a trust department, or a company doing a trust business only, should have some or all of the following divisions:

1. Personnel
2. Personal Trusts
3. Custody and Safekeeping
4. Fiscal Agency
5. Corporate Trusts
6. Transfer and Registration
7. Reorganization
8. Bond and Mortgage

9. Investment
10. Real Estate
11. Accounting
12. Distribution
13. New Business
14. Audit

Whether such divisions shall be organized in combinations, under certain officers, or whether each division shall be assigned to a separate officer with sufficient number of assistants—and all divisions be supervised by the trust officer—is a matter depending upon the size of the bank or trust company and the volume and variety of its trust business.

ORGANIZATION CHARTS.—The following organization chart will be found useful for trust departments of moderate size:

(Form of Organization Chart)

Board of Directors

Auditor — Trust Committee

President

TRUST OFFICER

Personnel

New Business

Assistant Trust Officer	*Assistant Trust Officer*	*Assistant Trust Officer*
Personal Trusts	Corporate Trusts	Investments
Custody and Safe-keeping	Transfer and Registration	Accounting
Bond and Mortgage	Fiscal Agencies	Distribution
Real Estate	Reorganization	

A more complete set of charts, showing forma-

tion of a model trust department, will be found in the appendix of Wills, Estates, and Trusts, by Conyngton. These charts, ten in number, outline in minute detail the several functions of the following departments or divisions:

TRUST DEPARTMENT

Generally
with
Nine Separate Subdepartments or Divisions
Each with Its
Several Separate Sections

Further charts and outlines, suitable for small, medium-sized, and also large trust companies or departments, will be found in the book entitled, Trust Departments in Banks and Trust Companies, by Clay Herrick (1925).

The following is given as an illustration of the trust department organization of a moderately large trust company in the East:

*(Form of Organization Chart)**

BOARD OF DIRECTORS

President

Finance or Trust Committee		Auditor Audit Department All Accounts and Records
Vice President	Vice President	Vice President
	Treasurer Safekeeping and Custodies Records	General Supervision Personnel

TRUST OFFICER

Assistant Trust Officer	*Assistant Trust Officer*	*Assistant Trust Officer*
Transfer and Registration Officer	Personal Trusts	Development of New Business
Corporate Issues and so forth	Administration	Real Estate Officer
Stock Transfers	Agencies	Real Estate
Stock Registration	Investments	Rents, Sales, and Purchases
Reorganization	Distribution	Bonds and Mortgages
Coupon Payments	Accounting	Rent Collections
Dividend Payments		Taxes and Charges
Bond Interest	Records	Repairs
Fiscal Agencies	Bookkeeping	Insurance
Records		Records
Bookkeeping		

QUALIFICATIONS OF A TRUST OFFICER.—From the standpoint of the work with which this text especially deals, namely, that of trust departments or trust companies, the officer whose duties are of the greatest importance is naturally the trust officer. Just what his qualifications should be is a subject that has elicited many and diverse opinions. A fair composite of these opinions may be summed up by enumerating the following qualifications of an efficient trust officer: While it is by no means essential that he should be an attorney, it would nevertheless be helpful if he had a fair working knowledge of the law of corporations and wills, of the probate law, and also of the jurisdiction and practice of the probate courts. He should also be able to cooperate, when occasion arises, in the incorporation and formation of corporations under the

*See Volume II, Conyngton on Wills, Estates, and Trusts

laws of his state and should know when such a corporation is properly organized. He should be able to review and constructively criticize an ordinary will. In addition, he should possess good business judgment and should be able to sense those occasions when it is necessary or expedient to consult counsel about any phase of the trust business requiring special study and proper legal action. Moreover, as most of his work involves dealing with individuals and their problems, his crowning qualification should be that human sympathy and human touch so necessary to a wise and profitable administration of the estates and trusts which may at any time be in his care.

METHODS OF MEETING RESPONSIBILITIES.—As the trust officer is usually responsible for the conduct and successful operation of the entire trust department, he should endeavor at all times to keep in general touch therewith, delegating to his assistants, as indicated in the chart above, the various divisions of the work properly assignable to them. He should avoid all detail work, if possible, applying himself almost exclusively to supervision. He should be ready to advise clients and beneficiaries, when they call regarding their affairs, or be able to refer them readily to those of his assistants who are most familiar therewith. In many organizations it is the practice for the trust officer to hold conferences with his assistants and heads of departments—often the first thing in the morning—and to discuss important questions of

administration, problems which have arisen, questions of policy, and, generally, all matters the discussion of which will tend to increase the efficiency of the department.

It is also quite generally conceded that matters of new business, advertising, and so forth, should be under the immediate supervision of the trust officer; he is assumed to be the person best informed regarding the services which may be rendered by the trust department of his organization in the several divisions thereof.

The trust officer must be able to judge, in those matters which involve unusual problems and in all special cases, as to which of them are of sufficient importance to be referred by him to the president and the trust committee—or a similar body—or to the directors, for decision.

DUTIES OF OTHER OFFICERS AND HEADS.—The assistant trust officers and heads of departments and divisions, under the supervision and direction of the trust officer, of course, should direct the work under their immediate charge and should see to it that the various people assigned to specific duties are well qualified therefor. The assistant trust officers and heads of departments and divisions should therefore be given the opportunity to suggest the character and qualifications needed by those who will be expected to do work in their respective departments and divisions. It would seem wise, however, that the general supervision and control over the personnel of

the trust department as a whole should be in the province of the trust officer.

PERSONNEL.—What has already been said indicates the importance of selecting those persons who are best fitted and qualified for the various kinds of work to be done in a trust department. It applies to matters of mere—and seemingly unimportant—detail as well as to those of greater and larger import; it includes the constant necessity for training the trust staff for the more important duties lying immediately ahead of them. The rise of men and women in trust departments and trust companies throughout the country, from most humble positions to places of high rank, clearly shows the great possibilities in this field. Such men and women are usually those who are willing to study hard and to apply themselves diligently in order to become ever more and more efficient. They are found to be fully equipped for the next higher step when opportunity knocks.

NEW BUSINESS.—Practically all but one of the functions of the average trust company or department, using that term in its broadest significance, have now been enlarged upon or briefly referred to; the exception is that vitally important matter of the development of new business. It is vitally important because, obviously, unless new business is constantly obtained, the bank or trust company will sooner or later cease to function.

THE SALESMANSHIP PRINCIPLE.—The dual subjects of new business in general and of ob-

taining the same have received consideration in many addresses, pamphlets, and articles. The usual rules applicable to good salesmanship apply with equal force to the selling of trust services to prospective clients. The principal sources of new business are:

1. Directors and officers
2. Present customers
3. Non-customers

The generally accepted methods of securing new business are direct and indirect advertising through the use of local newspapers, booklets, folders, and letters. Direct solicitation is being recognized more and more in securing trust business.

Of course, we may add, as desirable but not necessarily important, the capitalizing of opportunities daily afforded to the members of the staff, however minor their positions may be, to present trust services to clients of their bank. Another avenue is cooperation with those members of the bar with whom contacts are made. The possibilities of such cooperation are recognized by many of our trust officers and their associates.

All directors and officers of a bank or trust company should be not only willing but desirous that their bank should act for them in such matters as come within the category of trust services. In addition, by reason of their wide business and social acquaintance, they should be able to induce a large number of persons to entrust their estate affairs to the bank and to have the bank act

for them in other fiduciary capacities. To a certain extent this statement might also be made of the staff generally.

The clients of a bank or trust company in other departments, *i. e.,* in the deposit department, safe deposit department, loan department, and in any other department, furnish a logical and fruitful source of new trust business. As they have already shown their confidence in the institution by their dealings with those other departments, it is but natural to suppose that, if the matter is properly presented to them, they will desire to have the bank act for them as executors of their wills, as trustees under deeds or wills, or in some other fiduciary or agency capacity, as the case may be and as their needs suggest. Moreover, the clients of the trust department are often willing to recommend the services of the department to their relatives, friends, and acquaintances. The bank or trust company must first make these clients conscious that its aim is to render uniformly helpful and satisfactory service. Such recommendations, if properly followed up, as they should be, will certainly prove a fruitful source of new business of various kinds.

Seeking and obtaining business through direct solicitations is a very delicate matter and should be carried on only by those who are especially qualified by nature, temperament, experience, and training to do so. Scanning and analyzing the list of stockholders will often produce valuable leads, as

will also a careful study of accounts of large depositors. Suggestions may also come from other sources. Keeping informed of persons concerned in important business transactions and also of those prominent in the social world will multiply the opportunities for new business. The solicitation of such men and women is an important task; yet, many a "new business" man will testify that, handled tactfully and with an immovable confidence in the organization's fitness to render a real service, such solicitation has resulted not only in much new business but also in many new friends.

ADVERTISING.—How and when and to what extent to advertise, or whether to advertise at all, have been subjects of many discussions and themes of many papers at various times and places.

If the advertising is done in a dignified way and is limited to setting forth the various functions of the trust company or department and to emphasizing the variety of such functions and the value thereof to the prospective clients, it will not justly be subject to criticism. It should, on the contrary, prove to be a valuable source of new business. Advertising, however, has now become such a specialized business that it seems folly for a trust organization, unless it employs a skilled person for this work, to undertake in its own behalf any campaign of advertising. When the financial standing of the institution warrants it, such a campaign should be undertaken, but only by a well qualified advertising company, under proper supervision.

The slogan "Every member of the trust staff a salesman" is a good one. From day to day members of the staff have contacts with many different clients of the institution and often with strangers. Almost every interview is a sales opportunity if capitalized. It should be the aim and ambition of every member of the staff to increase the business of his organization and to enlarge its field of usefulness. Wherever the above practice has been encouraged, much good work has been done and a considerable amount of new business has been obtained and all have benefited.

Incidentally, it may be remarked that it is a matter of great pride in some organizations that every one of the directors, officers, and employees has chosen or appointed his institution to act for him in some fiduciary capacity; such pride is justified, and it is a practice which, so far as may be possible, should be universally encouraged.

COOPERATION WITH THE BAR.—Members of the bar of the city, county, or state in which the trust company or bank is located control much trust and fiduciary business, some of which is handled in their own offices and by their own respective staffs. The complexities of the trust business and the mass of detail in connection with the records to be kept, particularly with respect to corporate trusts of all kinds, are becoming so great and varied that lawyers everywhere are beginning to realize more and more the advantages of the services offered by trust companies and trust depart-

ments; they are more willing than ever to recommend the use thereof, retaining for themselves the legal and technical work to be done, from time to time, in connection with the affairs placed in the care of trust companies or departments. It is usual for practically every institution to retain as counsel, in the estate, trust, or other fiduciary relationship, the same attorney who represented the decedent or his family in his lifetime or through whose good offices the business was secured. In the absence of such counsel, some organizations follow the practice of calling upon a selected list of attorneys, from time to time, to do such necessary legal work as must be attended to in connection with almost every trust.

A STATUTE OF IMPORTANCE.—In concluding this text, it seems opportune to call attention to a statute which has been enacted by several of the states and which, it is expected, will be enacted eventually by other states. While it is not a matter strictly allied to the exercise of trust functions, it is of importance to trust companies and banks because it affects the work incident to several departments and tends to reduce the responsibilities assumed in dealing with fiduciaries. Furthermore, its adoption lessens many of the dangers incident to the transaction of business with those acting in a representative capacity. The statute referred to is generally known and styled as the Uniform Fiduciaries Act and, as enacted by the legislature of

the State of Pennsylvania in 1923, reads as follows:

UNIFORM FIDUCIARIES ACT

No. 256. P. L. 1923 p. 468.

Concerning Liability for Participation in Breaches of Fiduciary Obligations, and to Make Uniform the Law with Reference Thereto

Section 1. Be it enacted, and so forth, That —— Definition of Terms —— (1) in this Act, unless the context or subject matter otherwise requires,

"Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

"Fiduciary" includes a trustee, under any trust expressed, implied, resulting, or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust, or estate.

"Person" includes a corporation, partnership, or other association or two or more persons having a joint or common interest.

"Principal" includes any person to whom a fiduciary, as such, owes an obligation.

a. A thing is done "in good faith" within the meaning of this Act, when it is in fact done honestly, whether it be done negligently or not.

Section 2. Application of Payments Made to Fiduciaries. A person who, in good faith, pays or transfers to a fiduciary any money or other property, which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary, and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary.

Section 3. Registration of Transfer of Securities Held by Fiduciaries. If a fiduciary, in whose name are registered any shares of stock, bonds, or other securities of any corporation, public or private, or company or other association, or of any trust, transfers the same, such corporation or company or other association, or any of the managers of the trust, or its or their transfer agent, is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in making the transfer or to see to the performance of the fiduciary obligation, and is liable for registering such transfer only where registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in

making the transfer or with knowledge of such facts that the action in registering the transfer amounts to bad faith.

Section 4. Transfer of Negotiable Instrument by Fiduciary. If any negotiable instrument, payable or indorsed to a fiduciary as such, is indorsed by the fiduciary, or if any negotiable instrument, payable or indorsed to his principal, is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of, or as security for, a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument.

Section 5. Check Drawn by Fiduciary Payable to Third Person. If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of, or as security for, a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary, in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument.

Section 6.—Check Drawn by and Payable to Fiduciary. If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary whether in payment of a

personal debt of the fiduciary, or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.

Section 7. Deposit in Name of Fiduciary as Such. If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit, or any part thereof, upon the check of the fiduciary signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of, or as security for, a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

Section 8. Deposit in Name of Principal. If a check is drawn upon the account of his principal, in a bank, by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of, or as security for, a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivery of the check.

Section 9. Deposit in Fiduciary's Personal Account. If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary; or of checks payable to him as fiduciary; or of checks drawn by him upon an account in the name of his principal, if he is empowered to draw checks thereon; or of checks payable to his principal and indorsed by him, if he is empowered to indorse such checks; or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary, and the bank is author-

ized to pay the amount of the deposit, or any part thereof, upon the personal check of the fiduciary, without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith.

Section 10. Deposit in Names of Two or More Trustees. When a deposit is made in a bank in the name of two or more persons as trustees, and a check is drawn upon the trust account by any trustee or trustees authorized by the other trustee or trustees to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee or trustees to draw checks upon the trust account, and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith.

Section 11. Act Not Retroactive. The provisions of this Act shall not apply to transactions taking place prior to the time when it takes effect.

Section 12. Cases Not Provided for in Act. In any case not provided for in this Act the rules of law and equity, including the law merchant, and those rules of law and equity relating to trusts, agency, negotiable instruments, and banking, shall continue to apply.

Section 13. Uniformity of Interpretation. This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

Section 14. Short Title. This Act may be cited as the "Uniform Fiduciaries Act."

Section 15. Inconsistent Laws Repealed. All acts or parts of acts inconsistent with this Act are hereby repealed.

APPROVED—The Thirty-first day of May, A. D. 1923

At the present time, a similar act is in force in the states of Wisconsin, Colorado, Idaho, Louisiana, Nevada, North Carolina, Utah, and New Mexico. Substantially similar laws have also been adopted in California and Oregon.

In connection with the foregoing statute, there are two very illuminating articles concerning the responsibility of a bank for misappropriation by a

fiduciary, both prompted by the decision of the Circuit Court of Appeals, Second Circuit, in 1926 (9 Fed. 2nd., 713). One of these articles appeared in the Yale Law Journal (Vol. 35, No. 7, May 1926, page 854) and the other in the University of Pennsylvania Law Review (November 1926, page 64 of Notes). Both of these articles should be read and carefully analyzed by the student as there is much in each of them which will be of interest and profit. Another interesting article on this subject appeared in the Harvard Law Review, June 1927, page 1077 (Vol. XL No. 8). Since the above articles were written, the case cited (Cahan v. Empire Trust Co., 9 Fed. [2nd] 713) was reversed by the Supreme Court of the United States in a decision handed down by Justice Holmes, May 31, 1927. (See Empire Trust Co. v. Cahan, U. S. Sup. Ct. 71 Legal Ed. 826.)

As this text is concluded, attention is again directed to the fact that, in the main, most subjects had to be, *ex necessitate,* dealt with in a general way because of the great lack of uniformity in the statutes of the several states dealing with estates, fiduciary activities, and matters incident thereto; and also because of a similar lack, in many instances, of uniformity in the decisions of the courts of the several states dealing with these matters; and, further, because of the difference in methods, not usually in fundamentals but rather in details, adopted and used by the various trust companies and trust departments throughout the country, in handling the trust matters herein discussed.

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